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**Myths of Merit**

**Judicial Diversity and the Image of the Superhero Judge.**

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### **Myths of Merit,**

#### **Judicial Diversity and the Image of the Superhero Judge.**

##### **Abstract:**

This thesis is a critical analysis of reforms of the judicial appointments process which are designed to encourage judicial diversity. It does so by applying the concept of myth to law, and argues that because the judge is understood as a superhero, the definition of judicial merit has come to reflect this ideal, which is neither accurate nor sufficient. It neither reflects what judges do, nor adequately describes what it is that judges should do. Therefore it is argued that attempts to diversify the judiciary are limited by the image of the superhero judge, which, in this thesis, is described as myth, with distinct socio-cultural effects.

It is argued that there are two potential methods of approaching judicial diversity. The first is diversity of form, which focuses on gender, ethnic background, different levels of physical ability and economic status of the individual. The second is diversity of thought, which focuses on achieving a judiciary diverse in terms of its experience of and approaches to the law. In order to argue that diversity of thought is preferable to diversity of form, this thesis discusses in depth the decision making processes of the most 'different' law lord, namely Baroness Hale, who, as the first female and the first academic law lord, represents both diversity of form and diversity of thought. This thesis argues that her difference is not a result of her gender, but a result of her different experiences with and approaches to the law.

The argument put forward in this thesis is that in understanding the judge as superhero, identified in this thesis as the Herculean image of the judge, the role of the judiciary is limited. This thesis argues that the role of the judge has changed in the wake of the Human Rights Act 1998. The role of the judge has become more politicised, and as such it is necessary to revisit popular understandings of the judge. It is argued that the reforms to the judicial appointments process confirm the ideal of the superhero judge and reflect an expectation that the 'different' judges, that is, judges from different backgrounds, will simply confirm to the superhero or Herculean ideal. This thesis then puts forward the image of Loki, the trickster god of Norse mythology, as a more attractive judicial image, arguing that the changes in the judicial role require an image of the judge which is more flexible and able to accommodate different experiences, understandings and approaches to the law.

**Myths of Merit,**  
**Judicial Diversity and the Image of the Superhero Judge.**

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## Table of Abbreviations

American Anthropologist	Am. Anthr.
Berkley Women's Law Journal	Berkeley Women's L.J.
Buffalo Law Review	Buff. L. Rev.
California Law Review	Cal. L. Rev.
Cambridge Law Journal	C.L.J.
Criminal Law Reports	Crim. L. R.
Criminal Law Review	Crim. L. Rev.
Current Legal Problems	C.L.P.
European Human Rights Law Review	E.H.R.L.R.
Feminist Legal Studies	Fem. L.S.
Fordham Law Review	Fordham L. Rev.
Georgia Law Review	Ga. L. Rev.
Harvard Theological Review	Harv. Theological Rev.
Harvard Women's Law Journal	Harv. Women's L.J.
International and Comparative Law Quarterly	I.C.L.Q.
International Journal of the Legal Profession	I.J.L.P.
Journal of American Academy of Religions	J. Am. Acad. Relig.
Journal of American Folklore	J. of Am. Folklore.
Journal of Law and Education	J. Leg. Ed.
Journal of Law and Inequality	Law & Ineq. J.
Journal of Law and Religion	J.L. & Relig.
Journal of Law and Society	J. of Law and Soc'y.
Journal of the Society of Public Teachers of the Law	J.S.P.T.L.
Journal of Women in Culture and Society	J. Women in Culture and Soc'y.
Legal Studies	L.S.
Michigan Law Review	Mich. L. Rev.
New Law Journal	N.L.J.
New York Law School Review	N.Y. L. Sch. Rev.
New York University Review of Law & Social Change	N.Y.U. Rev. L. & Soc. Change.
Northern Ireland Legal Quarterly	N.I.L.Q.
Public Law	P.L.
Osgoode Hall Law Journal	Osgoode Hall L.J.
Seattle University Law Review	Seattle. U. L. Rev.
Social and Legal Studies	S. & L.S.
Stanford Law Review	Stan. L. Rev.
Texas Wesleyan Law Review	Tex. Wesleyan. L.R.
Utah Law Review	Utah Law Rev.
Virginia Law Review	Virg. L. Rev.
WLR	Weekly Law Report
William and Mary Journal of Women and the Law	Wm. And Mary J. of Women and the L.
William and Mary Law Review	Wm. and Mary L. Rev.
Yale Law Journal	Yale L.J.

**Myths of Merit,**  
**Judicial Diversity and The Image of the Superhero Judge**

**Introduction**

This thesis critically analyses recent reforms of the judicial appointments system which are aimed at achieving judicial diversity,<sup>1</sup> an analysis which is informed by the growing understanding of the application of myth to law.<sup>2</sup> The persistence of legal myths, and their potential to shape public understanding of the legal and judicial professions, reflect the power of storytelling to shape society.<sup>3</sup> The stories we tell ourselves and each other reflect our idealised models of what the law is and should be - in academic, as well as public, opinion.<sup>4</sup> This thesis discusses the image of the judge as superhero, and, focusing on the socio-cultural effects of this image, takes the view that it is a myth.<sup>5</sup> The myth, it is argued, acts as a barrier to judicial diversity, as, in understanding the judge as a superhero, an expectation and understanding of judicial merit<sup>6</sup> and the judicial role is created. This prefers and promotes an image of the judge which ignores or excludes alternative experiences or expectations of justice. Put another way, by requiring the judge to be a superhero his or her discourse is restrained to the preconceptions of what a 'good' judge would say and do.<sup>7</sup> Thus, it is possible for 'the image of the judge as superhero...(to retain) a tenacious grip on our understandings

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1 These reforms found statutory expression in the Constitutional Reform Act 2005, s64 (hereafter CRA 2005). The reforms are discussed more fully in Chapter 2.

2 See generally P. Fitzpatrick, *The Mythology of Modern Law* (Routledge, London 1992); R. West, *Narrative Authority and Law* (University of Michigan Press, Ann Arbor 1993); K.L. Schepele et al., 'Legal Storytelling, a symposium' (1989) 87 Mich. L. Rev. 1; J. Baron and J. Epstein, 'Is Law Narrative?' (1997) 45 Buff. L. Rev. 141.

3 As Delgado argues 'We participate in creating what we see in the very act of describing it.' Narratives in law and surrounding legal culture are part of the myth and misunderstanding of what it is that Judges do. R. Delgado, 'Storytelling for Oppositionists and Others, a plea for narrative.' (1989) 87 Mich. L. Rev. 2411, 2418.

4 Thus 'Myth is not something freely invented but a necessary mode of feeling and belief.' D. Bidney, 'Myth, Symbolism and Truth' (1955) 68 J. of Am. Folklore 379, 380-381.

5 The difference and significance of different forms of narrative is discussed more completely in Chapter 1, but it is important to note that the use of the term 'myth' in this thesis is not intended to be an exclusive one. This thesis argues that definitions of merit are codified by narrative, as idealised interpretations of virtues, and argues that both evolve over time.

6 Thus the myth has both normative and descriptive power, see above n. 5.

7 See S. Berns, *To Speak as a Judge, Difference Voice and Power* (Ashgate, Aldershot UK 1999) generally on the judicial duty to transcend the self to speak the law.

of the judge and judging'.<sup>8</sup>

This thesis argues that judicial diversity is a desirable goal which can be achieved in two ways. The first is a diversity of form, in terms of the appointee's social background,<sup>9</sup> that is their ethnic, religious, or socio-economic status, that is to say, gendered or class based constructions of the individual.<sup>10</sup> This mode of attaining judicial diversity has the benefit of promoting social equality, but does not require that we divorce ourselves from the image of the superhero judge, we merely allow other identities to become Hercules, and in doing so, take part in 'window dressing' in preference to reform. It also ignores changes in the judicial role which made the reform necessary, that is, the gradual politicisation of the role of the judge.<sup>11</sup>

This politicisation requires that the judicial narrative should be an attempt to speak for those who cannot always speak for themselves. It should create space for alternative experiences and understandings of the law. It should, as the decisions of Baroness Hale here discussed do, make sense of the unknown other, overturning entrenched assumptions, and allowing for the effect of their experience. Put another way, this thesis argues that the law assumes the reasonable man to have the same characteristics as the superhero judge, a disconnected and rational being, who is autonomous and self interested, and is capable of acting independently. This thesis makes the argument that a new judicial role requires a new image of the judge. It suggests that the judge should be capable of representing and voicing the interests of the unknown other, not simply an other in terms of gender, race or class, but rather, the individual who does not conform to the assumptions of the law. The example in this thesis is that of the battered wife, but it is not limited to that identity. This re-imagined judge should accommodate difference within the law, rather than adopting an approach which only seems to allow for the experience of those who fit within the constructs of the law.

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<sup>8</sup> E. Rackley, 'Narratives in Judging, When Hercules met the Happy Prince; Re-Imagining the Judge' (2004) 12 Tex. Wesleyan L. Rev. 213, 213.

<sup>9</sup> CRA 2005 s.64. See Chapter One for a more complete description of the two concepts of diversity of form and diversity of thought. This thesis takes the view that both are desirable, and not necessarily in opposition to the ideal of judicial merit.

<sup>10</sup> This form of diversity is described as 'diversity of form' in Chapter One.

<sup>11</sup> See below, Chapter Four.



In short, whilst the attempt to attain judicial diversity is welcome, the reforms fall far short of attaining judicial diversity of thought without reference to age, gender, sexual orientation or race. Rather, they confirm the ideal of the superhero judge, and simply admit the possibility that the 'different' judge can also conform to this ideal. This thesis argues that it is the ideal, or the myth, of the judge that needs to be challenged, in addition to the homogeneity of the bench. Taking the view that the traditional image of the judge, the Dworkinian ruler of Law's Empire,<sup>12</sup> is inaccurate and unhelpful,<sup>13</sup> it is argued that by maintaining this image of the judge through the appointments criteria a valuable opportunity has been missed. By foregoing the chance to re-imagine desirable judicial qualities, the Judicial Appointments Commission, charged with making recommendations for appointment solely on the basis of merit but with a regard to the need for diversity, has legitimized the image of the judge that Dworkin puts forward. This is evidence of the power of the incumbent judicial myth, and arguably, in order to effectively challenge this myth, a new image of the judge must be created. This thesis will suggest the image of Loki, an image derived from Norse mythology,<sup>14</sup> as an alternative way of imagining the judge.

With this approach in mind, this thesis examines the application of myth to law in Chapter 1. It discusses the socio-cultural effects of myth and argues that the myth of the superhero judge promotes an understanding of adjudication which is inaccurate, and it is the failure of this myth which has, in part, led to the focus on diversity of form. The idea that there is one right way to be a judge is, it is argued, misleading and unhelpful, reflecting an outmoded conception of the judicial role. Chapter 2 goes on to discuss the definition of merit supplied by the Judicial Appointments Commission and argues that it reflects the Herculean ideal. It proceeds to discuss the marginalisation and exclusion of women in the legal profession as a specific example of the Other, that is, identities and experiences which have so far been excluded from the dominant

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12 R. Dworkin, *Law's Empire* (Hart Publishing, Oxford 1998).

13 A. Hutchinson, 'Indiana Dworkin and Law's Empire' (1987) 96 Yale L.J. 637.

14 Loki was a 'trickster' god in the Norse pantheon, a mischievous and unpredictable character. He appears in many of the oral histories and legends which relate the doings of Odin (or All-Father) Loki, Thor and other Norse Gods. Loki is discussed more fully in Chapter Four, however, far from being a superhero, he is more of a culture hero, and is most memorably described in *The Poetic Edda*; Edition quoted in this thesis S. Sigfusson and S. Sturleson, 'The Elder Eddas of Saemund Sigfusson; and the Younger Eddas of Snorre Sturleson' available from [www.gutenberg.org](http://www.gutenberg.org) at <<http://www.gutenberg.org/files/14726/14726-8.txt>> last visited 23<sup>rd</sup> March 2008.

narrative. It argues that a misunderstanding of difference has allowed the principle of merit to be seen as a prior consideration to diversity. In doing so, Chapter 2 suggests that a tendency to ascribe intellectual characteristics such as empathy, detachment, connection, neutrality and care along biological, racial or other lines results in a concern that women, as an example of 'the Other' do not have the natural qualities of the incumbent judiciary.

Chapter 3 discusses Baroness Hale's decision in *R-v-Hasan*. It employs Carol Gilligan's articulation of difference from 'In a Different Voice',<sup>15</sup> in an attempt to highlight Hale's difference. Through a comparison of a case in which the proper formulation of a defence of duress was at issue to the Heinz Dilemma<sup>16</sup> this chapter argues that it is not her 'difference' that makes a difference but her professional and academic background. Chapter 3 argues that Hale's background allows her to articulate the experiences of the Other and weave them into the dominant narrative of the law. In short they permit a unique approach to adjudication, which has disrupted the myth as well as the aesthetic of a court exclusively populated by old white men,<sup>17</sup> changing the narrative as well as the image. This thesis will argue that the difference Baroness Hale's appointment and work in the Lords has made is due to her 'diversity of thought' (that is, a different professional background and experience, which changes her approach to legal issues and hence disrupts the narrative) as opposed to her 'diversity of form' (her gender, which alters the aesthetic of the Law Lords and thus the image).

This thesis takes the view that judicial diversity should attempt to challenge the image of judges and judicial merit, in order to reflect the expansion of the judicial role which resulted from the passage of the Human Rights Act 1998.<sup>18</sup> In doing so, it should release the judge from the image of the superhero, to create a myth of judicial decision making which does not attempt to guarantee neutrality and disconnection, but rather an understanding of judicial merit which permits judicial discourse to be a discussion which engages the social and moral context in which the judge operates and in doing so includes the experiences of the Other.<sup>19</sup>

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15 C. Gilligan, *In a Different Voice-Psychological Theory and Women's Development*. (2<sup>nd</sup> ed. Harvard University Press, Cambridge, Mass. 1993).

16 Gilligan above n. 15, 24.

17 E. Rackley, 'Difference in the House of Lords.' (2006) 15 S.&L.S. 163.

18 Hereafter the HRA 1998.

19 Delgado above n. 3, illustrating how a story told by different people can reveal different narratives,

This thesis then goes on to discuss changes in the judicial role created by the HRA 1998. It argues that a form of dialogic theory is appropriate to create the opportunity to have an informed and useful debate about the content of rights availed of under the HRA 1998. It also argues that the 'fearless interpretation' which is a desirable feature of human rights jurisprudence is, if seen to be compatible with the new judicial role, an essential part of the s.6 obligation under the HRA 1998, which requires the judiciary to behave in a way compatible with the act.

In making this argument this chapter will concentrate on the Supreme Court as will be, that is, the replacement for the House of Lords' Appellate Committee.<sup>20</sup> It will discuss the possibilities of an approach to the judicial role which embraces dialogic theory and allows for the moral and social knowledge of the judge to be employed. In conclusion, it will discuss the image of Loki, the trickster god of Norse mythology, as a conception of judicial merit in which diversity and merit are not at odds. It will suggest that a blend of academic and professional lawyers on the Supreme Court will allow for the ideal of diversity of thought to be realised. With these concerns in mind this thesis first turns to a discussion of the superhero image of the judge and its effects on common understandings of the judicial role and judicial merit.

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different perceptions, understandings and constructions of the same event.

20 As established by the Constitutional Reform Act 2005 Part 3 s23.

## Chapter One

### Hercules and Judicial Diversity

#### **Introduction**

This chapter discusses the image of the superhero judge and its implications for adjudication. It argues that the image of the judge as superhero is interchangeable with our common understanding of the judicial role as that of a neutral, detached umpire between competing parties. This understanding has led to a definition of judicial merit which neither reflects the existing reality of adjudication, or (as will be further discussed later in the thesis) adequately equip the judge for changes in the judicial role. Thus, not only is the image of the superhero judge an exclusive one, it is an image which is as potentially damaging to the public perception of the judiciary as the white male aesthetic of the Bench.<sup>1</sup>

This chapter explores the effects of the image of the Herculean, or superhero, judge on our<sup>2</sup> understanding of the judge and judging through an understanding of the application of myth to law.<sup>3</sup> It argues that the image of the superhero judge performs a mythic function, and that in its explanation of the judicial role this image remains a powerfully attractive ideal. It is suggested that our willingness to perceive Hercules as the ideal allows this image of the judge to remain operative on attempts to achieve a more diverse judiciary. Put another way, the image of the judge as superhero is still active on our imaginations, and in its description of judicial virtues lies a prescription

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1 Department for Constitutional Affairs, *'Judicial Diversity: Findings of a Consultation with Barristers, Solicitors and Judges'* Final Report Opinion Leader Research, January 2006 4.2.1. 'Current Perceptions, How the Judiciary is seen now'.

2 The word 'our' is used in this thesis to represent a broad array of groups, not solely those involved in legal work and culture, but also academics, legal commentators in the media, and private individuals.

3 The Herculean image of the judge as discussed in this thesis is derived from R. Dworkin, *Law's Empire* (Hart Publishing, Oxford 1998), but the Herculean Judge in this instance is used as an icon to explore our understandings of the judge and judging, and should not be read as a critique of Dworkin's work.

for judicial merit, and identity. His solid grip on the jurisprudential imagination has had a stultifying effect, the ideal of the judge as superhero has operated to exclude other possible images of the judge.<sup>4</sup>

This chapter begins with a discussion of myth and its application to law. It argues in Section I that myth is an essential part of legal activity, and that the law itself is 'founded on and constituted by myth.'<sup>5</sup> Through a review of the literature which studies the socio-cultural effects of myth and the (ab)uses of mythic structure and ritual in the courtroom and in the legal profession generally, Section I will attempt to establish that myth and law are interlinked, and that the narrative of law is a myth as opposed to another form of storytelling, and that the hero of this myth is of a specific type-that is, the superhero judge.<sup>6</sup>

Section II will examine the myth of the superhero judge and its implications for judicial decision making. It will argue that, as we understand the myth of the superhero judge to be both descriptive and prescriptive, that is, it adequately describes what judges do and what judges should be doing, the myth becomes in itself a prescription for judicial merit. Section II will argue that this myth has become an expectation of judicial behaviour, and thus acts as a barrier to judicial diversity. It argues that as the myth of the judge explains what judges do, it also acts as an ideal for who and what judges should be.

Section III will analyse the effect of the description of merit discussed in Section II. It will argue that the effect of the myth of the superhero judge has been to create an understanding of the judicial role which is limited to that of a neutral arbiter, a value-neutral discoverer of the law. The de-humanising effect of this myth, it shall be

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4 See E. Rackley, 'Representations of the (woman) judge, Hercules, the little mermaid and the vain and naked Emperor' (2002) 22 L.S. 602.

5 S. Williams, 'The Uses of Myth, a Response to Professor Basset.' (1986) 4 J.L. & Relig 153 for a review of the application of narrative to law. See also D.A. Farber, S. Sherry, 'Telling Stories out of School: An Essay on Legal Narratives' (1993) 45 Stan. L. Rev. 807; K. Abrams, 'Hearing the Call of Stories' (1991) 79 Cal. L. Rev. 971; R. West, *Narrative Authority and Law* (University of Michigan Press, Ann Arbor 1993); R. Delgado, 'When is a Story Is Just a Story: Does Voice Really Matter?' (1990) 76 Virg. L. Rev. 95.

6 R. A. Robbins, 'Harry Potter, the Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey' (2006) 29 Seattle U.L. Rev. 767 discusses different types of heroes, using C. Pearson's work in a legal context. The Appendices and 778-779 are, in the opinion of the author, particularly illustrative.

argued, has skewed attempts to create a diverse judiciary along reductive lines of gender, race, class and physical (dis)ability. In other words, the myth of the superhero judge has had such a powerful effect that attempts to achieve judicial diversity have focused on the social identity of the judge, whilst requiring these 'different' judges to conform to an impossible ideal, the myth of the superhero judge.

Section IV will argue, by way of conclusion, that there are different ways of achieving judicial diversity. It will argue that diversity in terms of the social identity of the applicant is welcome, but will argue that this is simply one method of achieving judicial diversity. Describing a diversity of 'difference' in which difference is linked to gender, race, class and other such criteria as 'diversity of form' this section will argue that a more ambitious but more worthwhile aim is 'diversity of thought' which focuses on the background and skills of the individual applicant, and attempts to ensure a balance of expertise in the judiciary. This section focuses specifically on the Supreme Court of the United Kingdom,<sup>7</sup> as it will be, to differentiate between the judicial role as an interpretation of evidence and facts, and the role of the judiciary at an appellate level as interpreting points of law.

Therefore, this chapter will make four crucial points. It will argue that myth and law are interlinked, and will qualify that with the argument that myth is merely one form of narrative, and has become the dominant narrative in legal discourse. It will discuss that most potent of legal myths, the myth of the superhero judge, and examine the effects of the myth on our shared expectations of the judge and judging. This chapter will conclude by arguing that the implications of the myth for judicial diversity are serious, in that a prescription for judicial merit limits the potential of judicial diversity, and that the failure of the judiciary to fully live up to this myth will damage public confidence in the judiciary. This chapter will suggest that by acknowledging the personal attributes, experiences and skills of potential judicial appointees, and creating a judiciary with a balance of expertise and ability, it is possible to re-imagine the judicial role, as well as the image of the judge.

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7 As established by the Constitutional Reform Act 2005 Part 3 s23 (hereafter the CRA 2005).

**Section I**  
**The Application of Myth to Law**

**Myth as a narrative form.**

The difference between myth and other forms of narrative requires a brief explanation. Although this thesis applies the concept of myth to law, other forms of storytelling are equally applicable and 'no given narrative will ever completely approximate any ... ideal type.'<sup>8</sup> This thesis makes the argument that the Herculean image of the judge has a mythic function in the legal community (see below). Different commentators, however describe the image of the superhero judge, and the story it tells, as different forms of narrative. For many, he is a fairy-tale<sup>9</sup> of adjudication. As Lord Reid describes it

Those with a taste for fairy tales seem to have thought that in some Aladdin's Cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words "Open Sesame". Bad decisions are made when the judge muddles the password. But we do not believe in fairytales any more.<sup>10</sup>

Although Lord Reid describes this narrative as a fairytale, the superhero image of the judge, as a detached, neutral arbiter with special knowledge of the law, appears to be closer to myth, as opposed to legends or fairytales. The classification used in this thesis is Littleton's two dimensional classification of narratives, which is added as an appendix.<sup>11</sup> Under Littleton's classification of narratives, five distinct forms of

<sup>8</sup> C. Scott Littleton, 'A Two Dimensional Scheme for the classification of Narratives' (1965) 78 J. of Am. Folklore 22, 22.

<sup>9</sup> See generally Rackley above n. 4.

<sup>10</sup> Lord Reid, 'The Judge as Law-Maker' (1972) 12 J.S.P.T.L. 22, 22.

<sup>11</sup> This classification can be represented both graphically and in prose form, which is the form

narratives can be observed, each of which serves a different social function. The forms he identifies are myth, marchen (a folk or fairytale), legends or sagas, histories and sacred histories.

A myth is a form of narrative which is extremely sacred and patently fabulous, including those narratives which purport to explain the creation of the universe, of the supernatural beings who direct it and of the human beings who populate it. As a fabulous narrative, it is unrelated to historic or scientific fact. Legends, or sagas, are relatively sacred and fabulous, and have at least a marginal relationship to historical or scientific fact, such narratives border on history or sacred history. Folktales, marchen, or fairytales, are relatively secular, yet fabulous narratives, which serve a similar function to myths but are told primarily for entertainment. Although they lack the sacred elements of myth they still rely on the element of the fabulous in conveying their message, and they may reflect themes expressed in myths and thus serve the same didactic function.<sup>12</sup> Histories are relatively secular and factual narratives, often an objective and factual account of past events. Sacred histories are narratives which are to a greater or lesser extent sacred in the communities which give birth to them, yet firmly grounded in historical fact.<sup>13</sup>

As Littleton notes, the status of stories is not fixed over time. Littleton's classification of narratives showed how it was possible for one type of narrative to change its form, so that a myth of one generation can become a fairy tale or 'Marchen' for the next, in his example Littleton has used the 'Alexander narrative' to plot the change in the story of Alexander from myth to legend, from myth to fairy tale and from legend to history and its return to the realm of legend.<sup>14</sup>

In his classification of myths, legal narratives can be placed between folktale and myth, to denote the contingent nature of this definition, the narrative may be a myth in one person's retelling of it, but it may bear features of the fairytale in another's. The function of myths or fairytales however, is an integral element of this definition as these narrative forms have didactic, representative and explicatory

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employed in the main body of the thesis. See Littleton above n. 8, also see Appendix 1.

12 The term 'folktale' is for the purposes of this thesis assumed to be interchangeable with the word 'fairy tale'.

13 Littleton above n. 8, 22-23.

14 Littleton above n. 8, 24, and at Appendix 1.



functions. These functions are more fully considered below, to examine their impact in the context of the superhero judge and the law itself.

### **Legal Storytelling**

The importance of myth, and its usefulness, lies... in the cultural understandings which it represents and the effectiveness with which it represents them.<sup>15</sup>

Myths reflect cultural values and popular understandings of the meaning of abstract concepts such as justice. Like other types of stories, they reflect aspects and social conventions of the culture which creates them. As David Gurnham has argued in the context of fairy tales, the stories of the Brothers Grimm and Charles Perrault (for example) reflect a conservative and patriarchal type of justice, explaining and justifying the content given to the concept of justice.<sup>16</sup> Myths act as codes for 'accumulated cultural understanding,'<sup>17</sup> they represent what a society understands, or what content they give, to concepts such as right and wrong, good and evil. The stories we tell ourselves as a society perform a social function. Masquerading as fictions, narrative forms reflect what we need to hear, or need to be taught, and would like to believe. In short, they are expressions of ideals and universal truths. Myths are thus not merely a primitive explanation of phenomena,<sup>18</sup> but the creation of a society as it evolves, a way of giving order authority, as well as a way of imposing order on apparently inexplicable natural events.

In short, myths are not merely stories told by adults to children to entertain, but they educate and inform us, both adults and children. They shape our perceptions of our environment, and in doing so, they create a world as real and convincing as day to day life. More importantly, the heroes and heroines of myth become representations of virtues and sins, definitions of good and bad which are written in often savage

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<sup>15</sup> Williams above n. 5, 154.

<sup>16</sup> D. Gurnham, 'The Forest-path of Law and the Wolf-belly of Justice: Legal Theory and Fairy Tale' (2006) 56 N.I.L.Q. 585.

<sup>17</sup> Williams above n. 5, 155.

<sup>18</sup> D. Bidney, 'The concept of myth and psychocultural evolution' (1950) 52 Am. Anthr. 16.

language.<sup>21</sup> The collection of images represents a codification of ideals,<sup>22</sup> in the case of law, the myths which surround it reflect conceptions of justice. Myths share with other narrative forms an instructive or didactic function as well as a representative one. In short, myths have three functions, the didactic, the representative and the explicatory.<sup>23</sup>

The didactic function of myth can be seen in its explanation of why judges have legitimacy. The judge is legitimate because the myth of the superhero judge and the transcendence conferred upon him by his separation from the community, or elevation above those he adjudicates upon, describe him as the codification of cultural values. That is, the myths describe why authority is vested in the (superhero) judge, and in doing so describes authority as only legitimately vested in those who can conform to his ideal. The superhero judge is an ideal composed of virtues which are associated with those who currently fill the role. Thus 'we participate in creating what we see in the very act of describing it.'<sup>24</sup> That is, the myth of the superhero judge explains why women (or the 'other') must become honorary men<sup>25</sup> to be considered as authoritative, because authority is only properly vested in a quintessentially male collection of virtues.<sup>26</sup>

The second function of myth is representative in the sense that it represents the cultural understanding and ideals of the social structures from which it emerges. In the myth of the superhero judge, he becomes the embodiment of pure reason. The myth represents a need for authority to be seen to be vested in those who have transcended the mundane concerns of everyday life, the 'petty' jealousies and emotions to which 'ordinary' people fall prey.<sup>27</sup> In doing so, the myth confers authority on these representations of virtuous male power, reinforcing the idea that authority is only properly conferred upon those who ascribe and aspire to these myths of order and

21 Gurnham above n. 16.

22 Bidney above n. 18, 17.

23 E. T. Lawson, 'The explanation of myth and myth as explanation' (1978) 46 J. Am. Acad. Relig. 507 discussing the various scholarly positions on the purpose of myth in society. The definition adopted here is intended to represent the uses of narrative, as was argued above, narratives are subjectively interpreted and in this thesis the narrative of the superhero judge is interpreted as myth.

24 R. Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative.' (1989) 87 Mich. L. Rev. 2411.

25 C. Wells, 'Exceptional Women or Honorary Men? Notes from the Women Law Professors' Project' (2000) 53 C.L.P. 181.

26 D. Kennedy, *A critique of adjudication; fin de siecle*. (Harvard University Press, Cambridge, Mass. 1997), 4.

27 See P. Fitzpatrick, *The Mythology of Modern Law* (Routledge, London 1992) generally on transcendence of order and reason over chaos.

rationality as universal and descriptive of justice.<sup>28</sup> The superhero image of the judge, in its elevation of reason and detachment to virtues indicative of authority, represents and structures a hierarchy of methods of reasoning, justifying the didactic function of the myth.

Finally, the myth serves an explicatory function, as it acts as a codification of an idealised legal system, and describes the value of the law as an essential ingredient to a just and ordered society. The superhero judge makes the law 'the best it can be'<sup>29</sup> acting 'as a conduit to and from the gods, possessing special powers to determine and articulate their will'.<sup>30</sup> It reminds the individual that the order or structure imposed by the legal system exists for the benefit of society, and is imposed by a superior. Thus it explains why it is necessary that authority and legitimacy be vested in the supremely rational figure of the superhero judge.

## **Legal Heroes**

The description of legal narratives as myths is also in part based upon a subjective understanding, whether by a reader or an author, of the events and the characters that have been described in the narrative. Legal narratives are placed and described principally as myths in part because of the characters that populate them. Mythic heroes invariably share certain characteristics. They undertake quests, learn or are born with special skills and abilities, they may slay dragons or gain treasure, and return the gift to or protect their community.<sup>31</sup>

The narrative of the superhero judge attributes to him a range of special skills and abilities when he decides cases. To use Dworkin's description of Hercules' decision making process, Hercules separates himself from the community with his neutrality, he embarks upon a quest to discover the meaning of the law in terms of the underlying principles which constrain his decision making in the hard cases.<sup>32</sup> His intelligence, acumen and commitment to reason<sup>33</sup> are special virtues which characterise him as

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28 Fitzpatrick above n. 27, 10-12 also Kennedy above n. 26, 3.

29 Dworkin above n. 3, 229.

30 Rackley above n. 4, 614.

31 Robbins above n. 6.

32 e.g. Dworkin above n. 3, 240 discussing Hercules' decision making process in *McLoughlin*.

33 Dworkin above n. 3, 265.

something other than a mere mortal, and through these he gains special knowledge of the law. He returns his gift to the community in the form of justice. This interpretation of the judicial role has been described as a noble dream<sup>34</sup> and can be seen as both a prescriptive and descriptive interpretation of adjudication. Like other myths, it purports to explain what it is judges do, describe what they should be doing, and justify why they are the ones doing it.

In other words:

Our sense that judges struggle for judicial constraint is one of the things that lets us “believe in” them. Because they are under strong norms to behave this way and often do behave this way, we (I) admire and respect and fear them, and willingly give them power to determine our (my) fate.<sup>35</sup>

The expectations of special abilities or virtues, the apparent quest to become separated from personal preferences, and the academic rigour that accompanies legal studies, feed into the public understanding of what it means to be a judge. Consequently, our expectations of their behaviour, and why we (willingly or not) obey their judgments, are informed by such aspirational models of the judicial image. This detachment, expressed as judicial constraint, is thus perceived as attained only through struggle and the possession of special skills. Like the Hercules of Law’s Empire, we must believe that a judge is a man of ‘superhuman intellectual power and patience.’<sup>36</sup> This belief allows us to have faith in their decisions. A further element of the myth is the belief that these skills are deployed with ‘good faith’, that is, that judicial reasoning is an attempt to make the law the best that it can be.<sup>37</sup> The judge must, therefore, be seen to decide neutrally, and our understanding of what makes a ‘good’ judge is informed by this. Thus, our conception of justice is similarly objective, demanding that individuals become identical before the law, with special circumstances being taken account of only in the most extreme cases. As the judge is reason incarnate, we are ‘bewitched into a vision of law and adjudication as rational ... What is forgotten in this

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34 H.L.A Hart, ‘American Jurisprudence Through English Eyes; The Nightmare and the Noble Dream’(1977) 11 Ga. L. Rev 969.

35 Kennedy above n. 26, 4.

36 Dworkin above n. 3, 239.

37 Dworkin above n. 3, 239.

enchanted garden of texts and Herculean judges is law's power to obliterate, to erase.<sup>38</sup>

## Legal Rituals

The description of the narrative of the superhero judge as a myth in this thesis is also due to the ritual of the courtroom. Myth is invariably associated with a ritualistic practice, which is taken with 'religious seriousness'<sup>39</sup> by those who participate in it. The practices of the court, and the symbols of judicial separation from the parties, such as judicial robes and the physical distance the judge achieves by sitting 'on the Bench' reflect the mythic nature of our understanding of the judge. The ritualistic conduct of the trial is part of what sustains the myth. The procedures of a court employ ritual to uphold the authority of the judge and the legal system he represents. Thus, in the process of the trial 'the wildest dreams of myth become the facts of ritual.'<sup>40</sup> As Helena Kennedy discussed, the costumes barristers and judges wear, the obfuscatory effect of technical legal language<sup>41</sup>, and the ceremonial aspects to the procedure of a trial create a sense of mystery, often causing confusion for witnesses and defendants.<sup>42</sup>

The ritual of a trial thus invokes traditional images of authority to emphasis the legitimacy of the court. Put another way, the courts depend upon the mythic tableau to visually reinforce their right to rule on the parties. Thus 'judicial conversation is an elite ceremony, administered and controlled by an initiated few.'<sup>43</sup> In this separation from, or transcendence of society, judicial legitimacy is achieved.<sup>44</sup> The faith in the superhuman judge is sustained not only by the practices and formalities of the courtroom, but by the individual's willingness to trust in these symbols as reflections or trappings of the judge's authority, which he derives from his special, if not privileged, position in public life. Thus the didactic function of the myth is communicated through the re-enactment of the myth in the physical structure of the trial.<sup>45</sup>

38 S. Berns, *To Speak as A Judge: Difference, Voice and Power* (Ashgate, Aldershot UK 1999), 28.

39 Bidney (quoting Langer) above n. 18, 18.

40 Lord Raglan, 'Myth and Ritual'. (1958) 68 J. of Am. Folklore 454.

41 H. Kennedy, *Eve was Framed-Women and British Justice* (Vintage, London 1993) 275-278.

42 Kennedy above n. 41, 275.

43 A. Hutchinson, 'The Last Emperor' in A. Hunt (ed.) *Reading Dworkin Critically* (Berg, New York 1992) 58.

44 Raglan, in his discussion of myth and ritual, argues that ritual actions can legitimise social conventions and behaviour above n. 40, 458.

45 Raglan above n. 40.

The structure of the trial, the hierarchy within the judicial profession itself and the various proper terms of address for judges of different status reflect the mythic nature of the image of the judge. In giving the judge a title we invoke images which reflect our desires for the nature of his role. As Clare McGlynn argued, the very name of the 'House of Lords' reflects, or reflected, the fact that women, or feminine qualities, were or are not expected to 'fit' there.<sup>46</sup> This suggests the image of the judge as a superhero is a mythic one because the myth is translated in the ritual<sup>47</sup> of the trial, and because the description of the judge as a superhero allows for distance to be achieved to create legitimacy'. As Berns put it 'through the power of abstraction...the law creates its own authority. It continually creates its own myths and enforces those myths on upon the bodies of its subjects.'<sup>48</sup> In distancing himself from human concerns, the separation gives the judge authority to make decisions which affect the fate of those whom he has been seen to transcend. Equally, it confers upon the judge the right to act without considering public opinion, as the judge is supposed to act with reference only to the demands of the law.

The term 'myth' is thus used in part as a shorthand for a broad array of fabulous stories, yet it has certain distinguishing features and distinct cultural effects. The effect of the image of the superhero judge identifies it as a mythic narrative. The term 'myth', which carries with it connotations of a sacred pantheon of actors, which acquire authority from some divine source and have special (or super) abilities and powers, makes it convenient to examine the judicial narrative as myth insofar as it describes Law's Empire and its ruler, the superhero judge, Hercules. In doing so, it becomes possible to identify the effect of such narratives and to consider the extent to which narrative is useful to those who wish to reform our understanding of the judge and judicial role.

This understanding of the mythic nature of law also has important implications for why it is undesirable to simply destabilise or eradicate legal narratives. Myths are not merely a cultural shorthand, but popular, well-loved, stories.<sup>49</sup> It is imperative to

46 C. McGlynn, *The Woman Lawyer, Making the Difference* (Butterworths, London, 1998) 171-180.

47 Raglan above n. 40.

48 Berns above n. 38, 24 'Through the power of abstraction...the law creates its own authority. It continually creates its own myths and enforces those myths on upon the bodies of its subjects.'

49 Williams above n. 5; Bidney above n. 18 and Raglan above n. 40.

also consider 'the unconscious structures of fascination, of captivation, of identification through which the subject is emotionally bound to the legal institution.'<sup>50</sup> as having an importance of their own. If, as Susan Williams argues, the law is 'founded on and constituted by myth.'<sup>51</sup> then simply recognising that the myth has power, or has operated to exclude those who do not conform to the myth of the superhero judge is an insufficient aim. The purpose of the myth, the cultural functions it serves, and the effects that it has must be identified before any attempt to destabilise it or weaken its hold on our imagination can be made.<sup>52</sup> Otherwise, by deconstructing the myth we risk demythologising the law, and in doing so removing the cultural shorthand that explains the authority of the law. To ignore the meaning of the myth ignores the fact that myths, and other forms of narrative 'are told because the telling of them meets some need or hunger in the narrator.'<sup>53</sup>

## **Section II**

### **The Myth of the Superhero Judge.**

Hercules is Superjudge, endowed with unmatched knowledge of the law and infinite time to trace the implications of principle. No mere magnification of any human judge, he is instead a metaphor for the way adjudication should ideally be done. Hercules, grasping all the interconnections of law, understands fully the purpose of the law. He decides cases in the way that puts the law in the best possible light according to its purpose. For Hercules there is one right way to decide a case, and he achieves that way. A decision by Hercules displays justice, fairness and integrity.<sup>54</sup>

The superhero or superhuman judge is an enduring myth in law. The most often

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50 C. Douzinas, P. Goodrich and Y. Hachamovitch, *Politics, postmodernity and critical legal studies; The Legality of the contingent*. (Routledge, London, 1994) 28.

51 Williams above n. 5.

52 Williams above n. 5, 154.

53 Berns above n. 38, 103.

54 J. Noonan Jr., 'Hercules and the snail darter.' *New York Times* 25<sup>th</sup> May 1986.

cited interpretation or description of this legal image is Dworkin's invocation of Hercules from Roman myth to defend his theory of law as integrity.<sup>55</sup> He represented a liberal ideal of decision making, an interpretation of the judicial role as a neutral discoverer of the law,<sup>56</sup> a 'Noble Dream'<sup>57</sup> of adjudication. Hercules was an aretaic interpretation of what judges should and could be doing. This perfected judge defended an understanding of the law as a complete and coherent framework of principle, in a community which adhered to that framework. In this vision of the judicial role, the judge was acting on behalf of a community in which dissent was unknown, an idealised social grouping where it was possible to create an idealised vision of adjudication. In this fictionalised environment, the superhero judge represented Dworkin's 'noble dream', an understanding of the judicial role as an application or investigation of set rules and principles.<sup>58</sup>

The ideal of the superhero judge is a figure endowed with supernatural attributes and abilities. Possessed of a god-like intelligence, he is also possessed of a god-like virtue. He is utterly impartial, in the sense that he has the ability to find and apply the law without fear or favour. More importantly however, the superhero judge has no political will of his own. The superhero judge 'acts as a conduit to and from the gods, possessing special powers to determine and articulate their will.'<sup>59</sup> In this interpretation, the judge was understood to uphold the values of neutrality and reason, an understanding of judicial merit which perceived the judge as the incarnation of wisdom and experience, who was also neutral and detached.

Yet, as Dworkin admits, this understanding of the judicial role created an image of adjudication which was impossible to realise.

No actual judge could compose anything approaching a full interpretation of all of his community's law at once. That is why we are imagining a

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55 Dworkin above n. 3, 239.

56 Rackley above n. 4.

57 Dworkin has most memorably been characterised as 'the Noblest Dreamer of them all.' by H.L.A. Hart above n. 34. See J.A.G. Griffith, *The Politics of the Judiciary*, (5<sup>th</sup> ed. Fontana Press, London 1997) for the 'Nightmare' conception of the judicial role. See also S. Lee, *Judging Judges* (Faber and Faber, London 1998) discussing both extremes of opinion on 'what it is that judges do'.

58 Dworkin above n. 3.

59 Rackley above n. 4, 614.



Herculean judge of superhuman talents and endless time.<sup>60</sup>

This image of the superhero judge is then an acknowledged myth. Ordinary judges must strive to emulate Hercules,<sup>61</sup> to allow their instinctive and inherent knowledge of the law to tell them the magic password. This allows them to find the right answer, and the answer is right because of their instinctive and inherent knowledge. Thus, the myth is seen to justify the authority of the decision. The separation of the judge from the community, his awesome powers of reasoning and refined, calibrated intellect, implies that the decision the judge makes is right because the judge has made it. This is then a mythological interpretation of judicial authority, a decision taken by an ideal in an idyll, a community of principle in which dissent is unknown.<sup>62</sup> The current interpretation, or image, of the Herculean image in public opinion is the white, Oxbridge educated male.<sup>63</sup> Although he may not resemble the Hercules of Roman myth, the lack of female and ethnic minorities to challenge the image of the 'pale, male' judiciary has resulted in the myth being attached to the aesthetic of the white male judge.

If the superhero judge is indeed a myth, and, as examined above, a myth is understood as a discrete narrative form with distinct social functions, then the effects of the myth must be considered. As a myth is a codification of ideals, the basis of inquiry must be what ideals the myth of the superhero judge represents; what effects it has had on what we expect from our judges, and on what we expect a good judge to be.<sup>64</sup> In investigating the meaning behind the image, it will be argued that Hercules still acts as a standard for judicial merit, and operates as a barrier to judicial diversity. In its promotion of neutrality, objectivity and reason as the highest judicial virtues and thus the basis of judicial authority,<sup>65</sup> the myth operates to devalue and exclude the virtues of sympathy, empathy and care as alternative bases for judicial authority and criteria for judicial appointment. These stereotypically 'feminine' qualities still seem to be

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60 Dworkin above n. 3, 245.

61 Dworkin describes Hercules as the ideal judge, suggesting that his ideal of judicial interpretation is both descriptive and prescriptive, Dworkin above n. 3.

62 Dworkin above n. 3, 211.

63 See generally Griffith above n. 57.

64 In other words, what the representative, didactic and explicatory functions of the myth are.

65 See the Judicial Appointments Commission's (hereafter JAC) definition of judicial merit as of October 2006 '*Qualities and Abilities*' available at <http://www.judicialappointments.gov.uk/select/qualities.htm>. Last visited 10<sup>th</sup> March 2008.

unwelcome in Law's Empire, and are seen to be incompatible with the established conception of judicial legitimacy. Thus, in attaining judicial diversity without acknowledging the myth of the superhero judge, the didactic, explicatory and representative effects of the established myth go unchallenged.

Thus the didactic function of the myth is unimpaired, instructing both legal and lay actors that there is one right way to be a judge. The implication of this is then clear, that women and ethnic minorities are desirable to enhance judicial diversity, but only insofar as they can conform to the stereotypically 'masculine' virtues which are seen as essential elements of judicial power and legitimacy. This suggests that the lack of judicial diversity does not stem from discrimination, but rather the prejudice<sup>66</sup> is a result of an inability to recognise the superhero judge as a myth. In other words, because the virtues associated with a good judge are also the stereotypically masculine virtues, women must become like men to be seen to be capable of being a good judge. Thus attempts to make the judiciary more diverse have focused on appointing more women, ethnic minorities and other under-represented groups to the role of the superhero judge, rather than questioning whether the image of the judge that is in the mind of the public and the legal profession is related to the composition of the judiciary.

The myth of the superhero judge has therefore had three distinctive effects, each of which can be aligned with the representative, explicatory and didactic functions of myth discussed above. The public perception of the judiciary as aloof and separated from society<sup>67</sup> can be seen as a result of the representative function of the myth. As the myth represents judicial virtues, the ideal judge is the neutral arbiter, separated from the concerns of the parties upon whom he must adjudicate. This perception is reinforced by the structure of the trial and the courtroom itself, reinforcing the myth with ritual.

The creation of an homogeneous judiciary which does not reflect the diverse make up of society in terms of ethnicity, gender or experience can be seen as a result of the explicatory function of the myth. As Kennedy describes, the image of the judge is

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<sup>66</sup> In the strict sense of 'prejudged' rather than to infer some form of illegitimate discrimination.

<sup>67</sup> As early as 1996 the judiciary were being instructed by the Lord Chancellor to 'shed their crusty image' -- 'Judges told to dispel 'aloof' image.' *The Independent* 16th April 1996; C. Dyer, 'Irvine prepared to drop judge's wigs' *Guardian* 30th June 2001.

synonymous with that of virtuous male power.<sup>68</sup> In other words, the myth ascribes these 'masculine' virtues to the established figures of authority. This then explains judicial legitimacy, by suggesting that the judge wields judicial power because he is possessed of these quintessentially masculine virtues, and that the judiciary itself is homogeneous because the virtues of the superhero judge are reserved for the chosen few.

A third effect has been to discourage applicants from diverse sections of society by instilling in them the belief that they do not conform to, or are not eligible for, judicial appointment. This is the didactic function. By identifying the superhero judge with virtuous male power the implication is that 'different' judges are unwelcome because they are inherently incapable of possessing such virtues. So candidates for judicial appointment who do not share the background of the incumbent judiciary feel that 'they wouldn't want someone like me'.<sup>69</sup> Thus, there are fewer applicants for judicial appointment for female, ethnic minority and other 'different' judges,<sup>70</sup> in part at least, because the didactic function of the myth has been effective, defining judges both positively and negatively. The myth of the superhero judge not only states who the ideal judge is, but equally, defines who he is not.

The image of the Herculean judge reflects a cultural need for a figure to believe in, a human taste for narrative, an image which is a receptacle for faith. The image represents and gives authority to the set of values he represents, as the victorious rational man. The resulting belief in semi-divine reason, creates a paradox at the centre of legal and judicial authority. The reality is that judges do not, and cannot, always act with pure reason, and are often influenced by their emotions, preconceptions, and cultural understandings. Yet, as this contradicts the myth of judicial neutrality and transcendental reasoning, it undermines the basis of public faith in the rule of law. If judges are irrational, then their legitimacy becomes questionable if their legitimacy derives from a commitment to reason, and their virtues are related to neutrality and

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68 Kennedy above n. 26.

69 Department for Constitutional Affairs, *Judicial Diversity: Findings of a Consultation with Barristers, Solicitors and Judges Final Report* Opinion Leader Research January 2006, 4.2.1 'Current Perceptions; How the Judiciary are seen now'.

70 above n. 69 Barriers to Applying 4.4.1 found that many were put off by the application form as well as the other reasons discussed in this thesis. Women, especially, seemed to find it difficult to 'sell' themselves on paper.

detachment.

To many, even the ideal of the superhero judge ruling in a community of principle was not as idyllic as it might appear.<sup>71</sup> The Empire that Dworkin dreamed so nobly was a world of disconnection to some, a place devoid of difference, in which equality meant the eradication of difference rather than its inclusion. A commitment to the ideal of the judge as superhero emphasised distance and detachment from the individual. It was a 'male bastion, in which women must become 'as important as men' to be recognised as citizens,'<sup>72</sup> where autonomy was of the highest value, overriding experiences or concerns which did not promote it. Put another way, rather than simply being an Emperor, Hercules came to represent a despot.<sup>73</sup> His attempt to make the law 'the best that it can be'<sup>74</sup> was seen as the creation of a fictional community in which the deprived were disregarded, and the Herculean 'monopoly on truth'<sup>75</sup> excluded the possibility of other conceptions of justice. In this way, the image of the judge as superhero became connected with or representative of criticisms of the traditional interpretation of the role of the judge and what it is that judges actually do.<sup>76</sup> The Noble Dream thus became a Nightmare of adjudication, a representation of all that was wrong with the judiciary, a shorthand for injustice, ignorance and prejudice. The myth, then, became a dual account of adjudication. Depending on the viewpoint of the narrator, the superhero judge could represent a hero or a villain.

### **Section III**

#### **Superhero or Super-villain?**

##### **Failure of the Myth**

This section compares the myth of the superhero judge with the failure of the

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71 See generally Hunt (ed.) above n. 43; Berns above n. 38; A. Hutchinson, 'Indiana Dworkin and Law's Empire' (1987) 96 Yale L.J. 637.

72 Hutchinson above n. 71, 652.

73 Hutchinson above n. 71.

74 Dworkin above n. 3.

75 Hutchinson above n. 71, 655.

76 Hutchinson above n. 71 made trenchant criticisms of the Dworkinian interpretation of the judicial role, using this as a lens through which to examine social inequality and the apparent indifference of the judiciary.

myth. It compares the nightmare to the noblest dream of them all, and does so in order to illustrate how a myth can ground or limit a discussion of the value of concepts. In short this comparison of myths illustrates several aspects to the myth which exemplify how it distorts the discourse on judicial merit by presenting a definition of merit as the ultimate ideal. It discusses both the Nightmare and the Noble Dream of adjudication, as the two dominant representations of the judge, the former representing the failure of the myth, and the latter representing the ideal to which all judges are expected to ascribe.

The nightmare vision of adjudication emerges when the judge fails to live up to the Noble Dream. Both images of the judge are mythic, and neither are fully descriptive of what judges do or who we believe judges are. Nor can it be argued that either the nightmare or the superhero image of the judge are fully prescriptive, the role of the judge increasingly, but not solely, involves political decision making,<sup>77</sup> and the judge must on occasion make decisions which reinforce the preferences of the majority. At the same time, it is desirable that the judge should protect minority rights and exhibit judicial independence.

Like the myths illustrated below, the object of the discourse is the justice, or lack thereof, in judicial decision making, both of which assume a certain amount of judicial neutrality. In Griffith's nightmare,<sup>78</sup> illustrated below on the right in italics, the judge is a flawed creature, disguising his political and social prejudices as decisions made in the interest of public policy. In Dworkin's noble dream,<sup>79</sup> the judge is merely adhering to the perfect framework of the law, and making decisions the best that they can be within this context. The table overleaf identifies the two extremes of this interpretation of judicial activity.

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77 See below, Chapter Four, for a more in-depth discussion on the changing role of the judiciary in the post Human Rights Era.

78 Griffith above n. 57.

79 Dworkin above n. 3.

<p>Having devoted his life to the law, this judge presides over cases with a neutral ear and unseeing eyes, the better to avoid the risk of his judgment being swayed by the parties,</p> <p>and the conflict of their rights which he must decide upon. Aloof, distant, and clothed in robes that still protect his invisibility, but also give him authority and remind him of his obligation to behave with integrity, and in uniformity with his colleagues. He seeks only to hear and know and apply the law, for the law is his all. Believing that it will always provide him with the right answer in any case,</p> <p>this judge applies his considerable mental faculties to conflicts of rights and struggles to disassociate himself from any personal preference in any case. He is learned and ageless, his snowy hair belies the youth and agility of the mind beneath. His neutrality beyond doubt, his reasoning beyond reproach.</p>	<p><i>This judge is a member of the elite, a personification of social injustice</i></p> <p><i>Arrogant and aloof, he excludes those who do not conform to his way of thinking or share his social background. For years he has relied on his privileged social position, and the confines of the old school tie network, to protect himself and his colleagues from dangerous and destabilising influences. He is the product of a class, and he enforces the preferences of that class through an apparently neutral adjudicative process. He is old, and out of touch with society. He approaches social change with a conservative mind, reflecting his background and education. His archaic values are replicated in his judgments, and his neutrality and reasoning are not beyond question.</i></p>
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The super-villain judge, illustrated in the right hand column above, reflects the failure of the myth of the superhero judge, as represented in the left hand column. It is a portrait painted of the failure of the judge to live up to our expectations of what it is that

judges do, and is thus a negative definition of judicial values. The difficulty is that this perception of the judge does not adequately reflect what it is that judges do any more accurately than the superhero image of the judge. These archetypal portrayals of the judge are not genuine reflections of the judiciary, but they are the images that are related by the myth. This analysis is at best reductive, and yet it reflects the immediate reduction of the judicial role to a binary conflict of principle or politics.<sup>80</sup>

In *A Critique of Adjudication: Fin de Siecle*<sup>81</sup> Duncan Kennedy addressed the idea of the judge as a decision maker suffering from role conflict. The judge, expected to act as a neutral arbiter, must behave without ideology, whereas in reality the judiciary has behaved strategically, disguising their ideological behaviour with arguments of principle and policy. It is our faith in their non ideological behaviour,<sup>82</sup> their transcendence of the concerns of the ordinary individual, that allows us to believe that the judge has submitted to something 'bigger and higher' than himself and we should therefore put our trust in him and his decision making process.

This analysis of what we wish to believe reflects the Dworkinian ideal of the superhero judge. Yet, as Kennedy describes

Some part of judicial law making in adjudication is best described as ideological choice carried on in a discourse with a strong convention denying choice, and carried on by actors, many of whom are (acting) in bad faith.<sup>83</sup>

It is the effect of the denial of the ideological role of the judge that gives rise to the 'Nightmare' image of the judiciary. In short, because some judges some of the time are seen to act in bad faith, the nightmare that the judiciary as a whole are politically active begins to emerge. This approach to the judicial role is bounded by the effect of myth on our perceptions of the judge. We are taught, and desire, to have faith that the judiciary is composed of transcendent, dehumanised and wise superheroes. In reality, we are aware that this cannot be the case. This denial adds to the disappointment when

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<sup>80</sup> See for example, Lee above n. 57.

<sup>81</sup> Kennedy above n. 26.

<sup>82</sup> Kennedy above n. 26, 4.

<sup>83</sup> D. Kennedy, 'Strategising strategic behaviour in interpretation.' [1996] Utah L. Rev. 785 at 826.

the judge is seen to fail in their superhero role.

participants in the legal culture and in the general political culture want them to. Everyone wants it to be true that it is not only possible but common for judges to judge non-ideologically (but)...everyone knows that the naïve theory of the rule of law is a fairy tale<sup>84</sup>

Whilst this analysis of judicial decision making dominated the pre Human Rights Era, we now must understand jurisprudence within a different context. The effect of the Human Rights Act 1998<sup>85</sup> on judicial decision making is discussed in the last chapter of this thesis, but it must also be noted here as its impact informs the author's attempt to reconcile judicial diversity and merit. It is an essential element of the constitutional changes brought about by the Act that it gives the judiciary greater power to scrutinise parliament, and any other body, which acts in the capacity of a public body.<sup>86</sup> This is not merely an expansion of the judicial role but has been perceived by many to be a fundamental shift in what we imagine the judge to be. In short, whether the image of the superhero judge was a worthwhile ideal, it can no longer be said that it is an adequate description of what it is that judges now do. It is arguable that in the wake of the Act the dichotomy of the judge adhering to the rational framework of the law and the judge adhering to his own political understanding has been harmonised, and the individual, as well as the judge, must take an intellectual step beyond the myths that surround the judiciary.

This element of the thesis will be examined in more detail in the final chapter. Raising the subject here is intended to answer an objection which might spring from a disbelief in the superhero judge. Whether or not the reader accepts the idea that there is an image of the judge as superhero, or as super-villain, and that this idea shapes our understanding of the judge and judging, the reader might more easily accept that the

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84 Kennedy above n. 83, 20.

85 Hereafter the HRA 1998.

86 See H. Fenwick, *'Civil Liberties and Human Rights'* (3<sup>rd</sup> ed. Cavendish Publishing London 2002)139-171.



Act has changed the role of the judiciary in our constitutional arrangements. Thus, it is not as contentious to suggest that in the wake of the HRA 1998, a fresh approach to the judicial role is, if not required, at least desirable.

In this examination of the myth of the superhero judge, his effects on the perception of the judge and the judicial role has been considered. Having established the relationship between myth and law and its potential to shape our understanding of the judge this chapter will go on to consider the effect the image of the superhero judge has had on the idea of a more diverse judiciary. This next section considers different ways of approaching diversity and argues that the idea of the superhero judge has skewed our concept of diversity by suggesting that there is one 'right' way to be a judge and that all that needs to change is the aesthetic, or social identity of the bench. This next section, then, considers two forms of diversity, described here as 'diversity of form' and 'diversity of thought'.

#### **Section IV**

#### **Diversity and Merit**

'Myth is most potent when it is assumed complacently that one is free of it.'<sup>87</sup>

#### **Diversity of What?**

When Dworkin discussed equality, he asked 'equality of what?'.<sup>88</sup> The same question can be asked of diversity-put another way, the pursuit of a value must consider different conceptions of that value. Different perceptions of the content of concepts, such as equality, diversity and justice are useful, insofar as they permit explorations of our understanding of that concept. This impacts the method of achieving the desired value. Unless the meaning behind the concepts is considered, background assumptions, such as those about the definition of judicial merit, are allowed to dominate potential

<sup>87</sup> Bidney above n. 18, 25.

<sup>88</sup> R Dworkin, *Sovereign Virtue. The theory and practice of equality* (Harvard University Press Cambridge, Mass. 2000); A. Sen, *Inequality Re-examined* (Clarendon Press, Oxford 1992) 12-31. The 'equality of what' debate illustrates the importance of giving content to ideals before they are pursued.

reforms. Diversity, conceived in terms of gender, ethnicity and class, allows the perpetuation of the myth of the superhero judge.

### **Diversity of Form.**

What this thesis identifies as diversity of form is the method of reforming or diversifying the judiciary which seeks to create a diversity of social categories. The discussions on diversity have centred around gender, ethnicity, and differing levels of physical (dis) ability amongst the judiciary reflects the limits of the Herculean ideal as a structure for judicial reform.<sup>89</sup> The participation of 'different' judges in the legal profession reflects the strength of the myth, as the discussion is and has been grounded in diversity of form. This diversity, then, is based upon the social identity of the individual, that is to say, what place they occupy in society. It implies a hierarchy of access, with the pale, male barrister at the top and the female or ethnic minority solicitor or barrister struggling to acquire eligibility for judicial appointment. Thus, the image of a diverse judiciary is simply that, relating to an image, or aesthetic. It wishes to correct how the judiciary are perceived (that is, as pale and male, and thus out of touch) rather than directly challenge the myth of the judge as a detached, neutral arbiter.

This suggests that the power of the myth is still extant, and is still affecting attempts to achieve judicial diversity. In other words, the myth remains the ideal, allowing the 'different' judge to conform to the Herculean image. The implication is then that men and women who are 'different' judges are eligible for judicial appointment if they can mimic the supposed or attributed virtues of the incumbent judiciary. By suggesting that the diverse judge must ascribe to the ideals of the incumbent judiciary the reforms presuppose that public faith in the judiciary will be adequately maintained by a change in the judicial image alone, rather than making a substantive change in the way the judiciary approaches issues of law in order to respond to changes in the role of the judge.<sup>90</sup>

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<sup>89</sup> Department for Constitutional Affairs, *'Increasing Diversity in the Judiciary'* Consultation Paper CP 25/04 13<sup>th</sup> October 2004 available at [www.dca.gov.uk](http://www.dca.gov.uk) last accessed 24th February 2008.

<sup>90</sup> See below, Chapter 4.

What is described in this thesis as diversity of form can be seen to be unsatisfactory for several reasons. The elevation of the principle of merit to a statutory requirement in opposition to diversity reflects the intellectual difficulty which arises when considering the composition of the judiciary. Although it is widely accepted, in principle, that the judiciary is, at present, not reflective of society and this is not satisfactory, the judicial role is one of such importance and increasing power that those who argue for judicial diversity cannot simply demand a quota system or an increased level of female participation, for example, without being accused of endangering the principle of merit. It seems that the foremost objection to a diverse judiciary is, then, the definition of judicial merit,<sup>91</sup> which reflects the ideal of the superhero judge, the codification of what we understand to be a 'good' judge.

Diversity of form as a basis for diversity also reflects the hierarchy discussed earlier, the idea that white male barristers are at the apex of the judicial appointments system and female or minority lawyers are struggling at the base of Mount Olympus. In other words, the implication is that 'different' judges cannot operate in the current system, and must become like the superhero judge in order to be eligible for judicial appointment. Again it becomes evident that the myth of the superhero judge is acting as a barrier, constructing 'different' judges as inherently ineligible for judicial appointment because they cannot, as themselves, become judges. This also implies that the neutrality of the judge is in some way related to their identity. By making the principle of merit subject to the principle of diversity<sup>92</sup> the inference is that that the 'different' judge carries a risk of bias,<sup>93</sup> whereas the incumbent judiciary do not.

Finally, diversity of form is unattractive because it links diversity to social and physical characteristics. It denies the possibility of difference in thought, perpetuating the myth that all judges think alike, that is, like Hercules. It also suggests that this is desirable. In other words, the charge to be laid against diversity of form is that it inhibits development of a diverse judiciary by structuring diversity itself along social constructs. In this way, it describes an intellectual norm shared by individuals of diverse backgrounds, implying that the right way to be a judge is the Herculean way,

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91 See CRA 2005 s63 and s64 which separate the concepts of diversity and merit and the JAC's duty to appoint subject to the principle of merit at their website [www.judicialappointments.gov.uk](http://www.judicialappointments.gov.uk).

92 CRA 2005 s63 and 64.

93 See E. Rackley, 'Judicial diversity, the woman judge and fairytale endings.' (2006) 27 L.S. 74.

but that anyone can be Hercules. So difference is negatively defined, it is not who the different judges are that makes them valuable, but rather, who they are not.<sup>94</sup> In short, the reform discussed in this thesis realises an odd utopia, a world in which everyone can be a superhero, whilst mandating that there is only one way to be a superhero.

## **Diversity of Thought**

Diversity of thought, as an alternative method of achieving judicial diversity, focuses on gaining a balance of legal and academic expertise on the Supreme Court, and other appellate jurisdictions, as an alternative to a higher judiciary which reflects the demographic make up of the legal profession. Put another way, the aim behind achieving a diversity of thought in the judiciary is to suggest that lawyers do not make the best judges. It suggests that other professional backgrounds, in this case legal academics, may have a contribution to make in adjudication. In this way, it is submitted, it might not be necessary to 'think like a lawyer' when thinking about the law, or rather, challenge the fiction that all lawyers and therefore judges think in the same way.

Diversity of thought is then an alternative method of resolving the conflict between diversity and merit, which is apparent for the reasons stated above, although denied by the Judicial Appointments Commission<sup>95</sup>, which is charged with appointing a diverse judiciary, subject to the principle of merit.<sup>96</sup> It does so by reducing dependence on the traditional method of appointing the judiciary, that is, through reliance on the Bar to produce qualified appointees. It discards the idea that great advocates make great judges,<sup>97</sup> and espouses the notion that a Supreme Court with a balance of expertise is better equipped to make decisions in an increasingly complex legal system, as well as an increasingly complex society. Indeed, in navigating the intricacies of an increasingly codified common law, the Supreme Court, as well as other appellate jurisdictions, should be as aware of the 'facts of life' as the plethora of legislation which regulates such facts.

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94 In short, they are different from what judges are, not a potential new judiciary, but rather, an antithesis of what judges are/were seen to be.

95 As established by Part IV s 61, constituted in Schedule 12, CRA 2005.

96 s 63 and s 64 CRA 2005.

97 Kennedy above n. 41, 49.

The term 'diversity of thought' is intended to convey the desirability of 'difference' in judging but also asserts that this difference is deliberately gender and race neutral. It implies that the importance does not lie in the social identity of the individual applicant but rather in the intellectual tools he or she can bring to the judicial role. It encourages difference, and does not suggest that one social identity is preferable to another or has been discriminated against in the past or currently. It does not imply that such considerations are irrelevant, but rather that they should be a secondary consideration in making judicial appointments. By doing so, it welcomes difference in thought, escaping the problems of essentialism by not ascribing the difference to a social category. It also aids the development of a diverse judiciary in terms of judiciary of form, as, in seeking difference in thought, the search for potential appointees must go beyond the fraternal culture of the Bar and into other fields of legal expertise. It acknowledges, as Hutchinson suggests, 'that adjudication in society of diverse and conflicting politics is an ideological undertaking'<sup>98</sup>, and that it is important to have a range of identities understood as well as represented.

In short this is a form of weak dialogic theory<sup>99</sup> which argues that the purpose of the judiciary in the wake of the Human Rights Act has been altered. It suggests that the purpose of the judiciary is to allow a broad range of views to be represented to the legislature, as well as to uphold the human rights of individuals against the actions of public authorities. Although dialogic theory is not without controversy, in this form it acknowledges the central premise that the role of the judiciary has been enhanced and expanded by the effects of the Human Rights Act, involving the judiciary in scrutiny of the legislature and public bodies to a greater extent than judicial review.

### **Conclusion**

This chapter has discussed the image of the Herculean judge as an exclusive aesthetic and myth. The Herculean judge, as understood through the lens of narrative, describes a world in which all are not merely equal, but identical before the law.

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<sup>98</sup> A Hutchinson, 'Judges and Politics, an essay from Canada.' (2004) 24 L.S. 275, 283.

<sup>99</sup> D. Nicol, 'Law and Politics after the Human Rights Act' [2006] P.L. 722.

The next chapter argues that attempts to achieve judicial diversity have been distorted by two things, the image of the superhero judge as prescriptive of judicial merit, but also a tendency to describe diversity in essentialist terms, that is, diversity of form as opposed to diversity of thought. That is, attempts to achieve judicial diversity have so far been structured as attempts to correct social inequality, and appoint more female, ethnic minority and disabled candidates to the bench. The assumption has been that these judges will subscribe to the Herculean ideal, whilst subtly improving the judicial product.<sup>100</sup> The effect of a focus on diversity of form, that is, an attempt to diversify the bench along the lines of the social identity of the individual applicant rather than the expertise and experience they have of the law creates a bench of 'Hercules with different faces'. This suggests that there is no need to reform the way we think about law, or re-imagine the judge and the judicial role, despite the fact that the role of the judge has changed and will change with the increasingly politicised areas in which judges are called upon to adjudicate.<sup>101</sup>

The next chapter examines the history of female participation in the legal profession, with particular focus on the exclusion of women from the upper echelons of the Bar and of the solicitors' profession which created an homogeneous source of talent from which the judiciary could be appointed. It examines the reforms of the CRA 2005 and discusses the implications of the new definition of judicial merit. It continues the argument touched upon in this chapter, that the diversity achieved under the terms of the CRA 2005 and the definition of merit provided by the JAC will not encourage diversity of thought, and do not challenge the ideal of the superhero judge.

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<sup>100</sup> The expectation that 'difference' will make a difference accompanies the appointment of most female or ethnic minority candidates. See for example B. Wilson, 'Will Women Judges Make a Difference.' (1990) 28 Osgoode Hall L. J. 507.

<sup>101</sup> See Chapter Four.

## **Chapter Two**

### **Judicial Diversity**

#### **Introduction**

The previous chapter discussed the image of the superhero judge and its impact on our understanding of the judge and judging. It argued that the effect of the image of the superhero judge was to limit judicial diversity diversity of form, that is, to certain social categories. Distinguishing between the concepts of diversity of form and diversity of thought, it was suggested that whilst the former could face charges of essentialism and conflict with the principle of merit, inasmuch as the two values are separated in the Constitutional Reform Act 2005,<sup>1</sup> the latter is more insulated from such charges because its principal concern is to encourage a diverse collection of minds on the bench whilst the principal aim of diversity of form is to increase the amount of women, ethnic minorities and disabled people.

This chapter examines the history of judicial diversity with specific focus on female participation in the legal profession. In Section I it reviews the history of female exclusion from the legal profession generally and the judiciary specifically. The history of the woman judge is used as a paradigm case, and is not intended to deny the experience of ethnic minorities and other excluded groups. Rather, the aim is to take a specific example of discrimination and exclusion to encourage consideration of the homogeneity of the judiciary.

Section II discusses arguments for greater female participation in the legal profession. It examines the 'difference' debate, and suggests that the attractive ideal of women bringing stereotypically feminine qualities to the Bench specifically and the legal profession generally grounded the debate on judicial diversity in the mire of essentialism and judicial bias. It argues that whilst judicial diversity is a worthwhile

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<sup>1</sup> Hereafter the CRA 2005, s 63 and s 64.

goal, by skewing the debate along the reductive lines of gender, race and class, the opportunity to re-examine the judicial role and our expectations of the judge has been lost.

Section III examines the reasons for homogeneity in the judiciary. It considers the role of legal, cultural and socio-economic factors in discouraging applicants and appointees to the Bench. It argues that whilst the role of these factors cannot be denied, the image of the superhero judge, the ideal of authoritative, virtuous male power feeds into the decisions made by both those seeking and granting judicial appointment. It questions whether, given this context, diversity will make a difference, and whether it will permit different conceptions of the judicial role to emerge.

Section IV discusses the recent reforms to the judicial appointments process which found statutory expression in the Constitutional Reform Act 2005. Specifically, it focuses on the separation of merit and diversity and the definition of judicial merit supplied by the Judicial Appointments Commission.<sup>2</sup> It argues that the separation of merit and diversity in the Act precludes the idea that diversity is an element of merit, and that the definition of merit supplied by the JAC reinforces the ideal of the superhero judge.

By way of conclusion, it will be argued that the image of the superhero judge is still operative on attempts to achieve judicial diversity. The focus of the argument will then shift from a general discussion of the judicial role to a more specific recommendation for the system of judicial appointments as relates to the House of Lords Appellate Committee, soon to be Supreme Court of the United Kingdom.<sup>3</sup>

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<sup>2</sup> As established by CRA 2005 Part IV s 61 and constituted in Schedule 12, hereafter the JAC.

<sup>3</sup> As established by the CRA 2005 Part 3 s 23.



## Section I

### Judicial Merit

As examined previously, the Herculean image of the judge embodies a myth of judicial decision making,<sup>4</sup> describing an idealised process of adjudication in which the judge does not consider anything other than what the law, and its underlying principles, demand.<sup>5</sup> The description of the judge as rational and aloof makes for a prescription of judicial behaviour which is far removed from that of ordinary citizens, a dispassionate and rational actor in an Empire of reason.<sup>6</sup> The myth thus carries with it a prescription for judicial merit. However, the prescription of merit is not an accurate description. Put another way, it relies on the existence of a form of 'judicial sixth sense'.<sup>7</sup> The concept of merit, at least as it pertains to the judicial role, is difficult to establish with any degree of certainty. Even though the appointments procedure has become more transparent, the definition of merit supplied by the Commission is not any more concrete than the previous conception of judicial merit which required the 'right' type of candidate and relied on a heavily socialised appointment procedure. were the necessary qualities for a judge. Indeed, the Commission's definition can be seen as a partial 'unpacking' of these concepts; distinct criteria are laid down only in the legislation, with regard to experience in the legal profession.<sup>8</sup>

The clarification of merit can be seen as negative. Put another way, it is easier to understand what a meritorious judge is not rather than what a meritorious judge is. The definition of merit suggests that the judge is not politicised, but as Kennedy

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4 D. Kennedy, *A critique of adjudication: fin de siecle*. (Harvard University Press; Cambridge, Mass, 1997) at 4; E. Rackley, 'Representations of the (woman) judge, Hercules, the little mermaid and the vain and naked Emperor' (2002) 22 L.S. 602 and the analysis in Chapter 1 of the function of the myth of the superhero judge.

5 E. Rackley n. 4 above. 614.

6 See A. Hutchinson, 'Indiana Dworkin and Law's Empire' (1987) 96 Yale L.J. 637.

7 See Lord Reid, 'The Judge as Law-Maker' (1972) 12 J.S.P.T.L. 22.

8 See Courts and Legal Services Act 1990 s71 (3) (c), and the CRA 2005 s25 (as regards qualification for the Supreme Court).

illustrates the judge may have strong motives for disguising their bias.<sup>9</sup> The reality is that the judiciary may or may not support one political party, but they will inevitably have political views in the sense that they will have opinions on social issues. These opinions are more likely to be shaped by personal and professional experience, in the same way as the judicial method of adjudication, or their set of concerns in approaching a particular legal problem, is likely to be shaped by their professional background.<sup>10</sup> In this way can the definition of merit be seen to be inadequate, as, if it does not take into account the social and political views of a potential appointee, there is a greater risk of homogenisation. If there is one 'right' way of being a judge, or a single correct method of approaching statutory interpretation, that method is likely to be political insofar as it will involve a perception of the judicial role as it relates to the sovereignty of Parliament. Put another way, whether a court adopts the position of due deference to the will of Parliament,<sup>11</sup> or takes the view that Parliament is entitled to demand judicial obedience, will have just as great an impact on judicial interpretation as whether the judge is able to claim personal integrity or agility of mind.<sup>12</sup> A sound knowledge of their field of expertise is an inevitable by product of the statutory requirement of several years successful practice as a solicitor or barrister,<sup>13</sup> but there is no guarantee that this sound knowledge will produce neutral or apolitical decision making. The more profound the understanding of the subject, the more likely it is that the judge will have a view on the issues raised by the facts of the case.

## **The rebirth of Hercules**

As discussed in the previous chapter, the reforms of the CRA 2005 accommodate the new functions of the judiciary with regard to human rights and judicial review, as well as their role, through the expansion of legislation, in regulating the private lives of citizens. Through the creation of a more representative and modernised judiciary, the reforms legitimise the enhanced judicial role. The redefined

<sup>9</sup> Kennedy above n. 4.

<sup>10</sup> See below, Chapter 3.

<sup>11</sup> See for example T.R.S. Allan, 'Human Rights and Judicial Review; a Critique of Due Deference.' (2006) 65 C.L.J. 671; M. Cohn, 'Judicial Activism in the House of Lords, a Composite Constitutional Approach.' [2007] P.L. 95.

<sup>12</sup> See the Judicial Appointments Commission (hereafter JAC) 'Qualities and Abilities' [www.judicialappointmentscommission.gov.uk](http://www.judicialappointmentscommission.gov.uk) last accessed 25th March 2008.

<sup>13</sup> Courts and Legal Services Act (1990) above n. 8.

judicial role arguably requires the re-imagination of the judicial image. A superhero must be created who can navigate the increasingly complex world in which judges now operate. Yet we remain wedded to the Herculean image of the judge, without considering whether he is appropriate as he is for the modern version of adjudication.

The superhero image of the judge is a judge with the traditionally masculine qualities of objectivity and neutrality. As he is seen to be separated from the concerns of the parties he is presumed to be capable of making a fair decision. This, as argued in the previous chapter, involves a process of denial of the possibility of ideology in adjudication.<sup>14</sup> Ideology, as well as the social identity of the individual, however, are simply examples of several factors which could affect a judge's decision making, as shall be discussed in the next chapter. The refusal to surrender the ideal of the Herculean judge is implicit in the newly defined criteria for merit the JAC released on October 31<sup>st</sup> 2006. These 'five core qualities and abilities ... are required for judicial office' and are listed on the JAC's website as follows:<sup>15</sup>

### **Intellectual Capacity**

- High level of expertise in your chosen area or profession
- Ability to quickly absorb and analyse information
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary

*He (Hercules) could decide all outstanding issues....He could decide what there is in the universe...what justice and fairness require, what freedom of speech, best understood, means...He could weave all that and everything else into a marvellously architectonic system. When a new case arises, he would be very well prepared .<sup>16</sup>*

### **Personal Qualities**

- Integrity and Independence of mind
- Sound judgement
- Decisiveness

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<sup>14</sup> See discussion of Kennedy, above, Chapter 1.

<sup>15</sup> See above n. 12.

<sup>16</sup> R. Dworkin, *Justice in Robes* (Belknap/Harvard University Press; Cambridge, Mass. 2006) 54.

### **-Objectivity**

- Ability and willingness to learn and develop professionally

*The spirit of integrity, which we located in fraternity, would be outraged if Hercules were to make his decision in any way other than by choosing the interpretation he believes best from the standpoint of political morality as a whole .....Hercules' final choice...flows from his commitment to integrity.<sup>17</sup>*

### **An ability to understand and deal fairly**

- Ability to treat everyone with respect and sensitivity whatever their background
- Willingness to listen with patience and courtesy

*An imaginary judge of superhuman intellectual power and patience..<sup>18</sup>*

### **Authority and Communication Skills**

- Ability to explain the procedure and any decisions reached clearly and succinctly to those involved
- Ability to respect and inspire confidence
- Ability to maintain authority when challenged

*Hercules aims to make the legislative story as a whole as good as it can be.<sup>19</sup>*

### **Efficiency**

- Ability to work at speed and under pressure
- Ability to organise time effectively and produce clear reasoned judgements expeditiously
- Ability to work constructively with others (Including leadership and managerial skills where appropriate.

*No actual judge could compose anything approaching a full interpretation of all of his community's law ....we are imagining a Herculean judge of superhuman talents and*

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17 R. Dworkin, *Law's Empire* (Hart Publishing, Oxford 1998) at 263.

18 Dworkin above n. 17, 239.

19 Dworkin above n. 17, 343.

The definition of merit replicates the image of Hercules, the 'Great Judge'. As Lee argues, jurists are scintillated by the notion of the great judge. The criteria he quotes, from Abraham, also reflect the JAC's definition of merit:

- demonstrated judicial temperament
- professional expertise and competence, absolute personal and professional integrity,
- an able, agile, lucid mind
- appropriate professional background / training'
- ability to communicate clearly, orally and in writing.<sup>21</sup>

This version of the ideal judge is virtually indistinguishable from the JAC's criteria in its effect, both on the imagination of the individual and the public's perception of what judges should be capable of doing and what they should not do. This is the ideal of the Judge as superhero, invoking the spirit of Hercules, and confirming both the nightmare and the noble dream of adjudication. However, in retaining the ideal of a Herculean judge the JAC differentiates 'him' from the other, the diverse. The operation of s.63 and s.64<sup>22</sup> conspire to reinforce the ideal image of the judge. The image of the judge offered by the JAC is carefully neutral and devoid of identity, so that it is 'difficult to imagine him taking a bath.'<sup>23</sup> Hercules remains an ideal, revealing more about our need to believe in the myth than the nature of the judge.<sup>24</sup>

In excluding the possibility that the 'difference' of a candidate could 'make a difference'- that is, by segregating the concepts of merit and diversity, the value of diverse views on the law is undermined. This exclusion of difference as an element of merit undermines the merit of the different. It justifies the perception that a woman will find for a female party because she is female,<sup>25</sup> or an ethnic minority candidate would

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20 Dworkin above n. 17, 245.

21 S. Lee, *Judging Judges* (Faber and Faber, London 1998) 123.

22 CRA 2005.

23 H. Cecil quoted by B. Hale, 'Equality and the Judiciary: Why should we want more women judges?' [2001] P.L. 489, 497.

24 Kennedy above n. 4.

25 E. Rackley, 'Judicial Diversity, the woman judge and fairy tale endings' (2007) 27 L.S. 74.

have sympathies towards those who claim to have suffered discrimination.<sup>26</sup> It clings to the construction of the 'diverse' as the 'other'.<sup>27</sup> and in doing so, allows the Herculean myth to continue unchallenged. It is then unsurprising that despite a statutory and political commitments to diversity, there is a failure to 'break the stranglehold of privately-educated white males over the high court bench.'<sup>28</sup>

As Lee argues 'all protagonists seem to agree that there is one right method, one right answer to the proper role for a judge. This is the central error of most jurisprudence on this topic....it is positively healthy for the judiciary to have different perceptions of their own role.'<sup>29</sup> Arguably, the advantage of a homogeneous judiciary was that it gave the appearance of homogeneity, and thus of stability and security, whilst disagreement, or even conflict, between judges has always occurred. The myth that that the judge is neutral and apolitical sustains the belief in the Herculean ideal.<sup>30</sup> The homogeneous judiciary is an element of the Herculean myth-the judges must all subscribe to, and thus reinforce, the Herculean ideal whilst in reality they may have substantial differences. In its definition of merit the JAC recreates the myth in a more subtle form – judges must think alike, but the requirement to encourage diversity suggests that they must also look different. The 'diverse' judges thus become 'the little mermaid'<sup>31</sup> giving up her voice, or difference and 'wears the Emperor's new clothes'.<sup>32</sup> This diversity, then, is diversity of form, a mix of ethnic and social identities ascribing to the superhero ideal, allowing no space for diversity of thought. This allows the Herculean ideal to be codified and given the legitimacy that comes from the written word.<sup>33</sup>

The separation of merit and diversity in the CRA 2005 and by the JAC itself reinforce the notion that they represent two separate and incompatible normative ideals. So the ideal judge tolerates the diverse judge, in the sense that they peacefully, if

26 Rackley above n. 25.

27 For discussions of the construction of 'other' in law see P. Fitzpatrick, *The Mythology of Modern Law* (Routledge, London 1992); S. Berns, *To Speak as A Judge: Difference, Voice and Power* (Ashgate, Aldershot UK 1999) especially Chapter 2.

28 C. Dyer 'First 10 high court judges under new diversity rules.' *Guardian* 28th January 2008 revealing a uniform selection of white men, the youngest of whom was 48, and all of whom were barristers. The article noted that 'none of the seven solicitors....got as far as the shortlist'.

29 Lee above n. 21, 131.

30 Kennedy above n. 4.

31 Rackley above n. 4.

32 Rackley above n. 4, 622.

33 See Berns above n. 27 especially Chapter 7 on the authority of texts.

uneasily, co-habit, rather than bringing the judiciary closer to the concept of an inclusive bench. The diverse remains marked out as different, and, as ever, 'Hercules' is the norm. In borrowing Dworkinian language, the JAC has appropriated his image of the ideal judge, and by prioritising, and in doing so differentiating, the ideal judge from the diverse the JAC has reserved judicial office for Hercules, whatever guise he wears.

## **Section II**

### **Women and the Legal Profession – the historical background**

'It is a sad irony that the mythical symbol of justice, the blind-folded figure ... which appears above our courts, is female, yet women as judges, the dispensers of justice, are few and far between.'<sup>34</sup>

Women and the legal profession, historically, have had an uneasy relationship. As participants in the trial process, they often find their concerns marginalised,<sup>35</sup> or they themselves demonised for acting as men do.<sup>36</sup> They have been seen as unfit to enter the legal profession due to their gentle natures, and delicate dispositions,<sup>37</sup> and have been seen as disruptive irritants to the fraternal culture of the Bar and Bench<sup>38</sup> This thesis focuses on the experience of female lawyers and judges in the United Kingdom, as a specific instance of the 'other' in the legal profession, embracing the idea of feminism as a movement which seeks to challenge inequality and discrimination on the grounds of socially constructed identity. It is to be noted that in the United Kingdom women who harboured ambitions to become lawyers faced a doubly difficult

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34 C. McGlynn, *The Woman Lawyer-Making the Difference* (Butterworths, London 1998) 171.

35 See generally B. Hale, 'The Sinners and the sinned against, Women in the criminal justice system' 20<sup>th</sup> Longford Lecture 31st January 2006. Available online at [www.fawcettsociety.org.uk/documents/longford%20lecture.pdf](http://www.fawcettsociety.org.uk/documents/longford%20lecture.pdf) last accessed 18th March 2008.

36 See L. Bibbings, D. Nicolson (eds.), *Feminist Perspectives on Criminal Law* (Routledge Cavendish Publishing, London 2000) generally but especially P. Carlen, 'Against the Politics of Sex Discrimination; For the Politics of Difference and a Women Wise Approach to Sentencing', 79.

37 *In re Goodell* 39 WR 232 (1875) – the application of Lavinia Goodell to be admitted to the Bar was refused by Justice Bradley, who opined that 'Nature has tempered women as little for the judicial conflicts of the courtroom as for the physical conflicts of the battlefield.' This Wisconsin case reflects an Anglo-American attitude to female participation in the legal profession, whether as solicitors, on the bench or at the bar, as essentially an inappropriate occupation for women'.

38 Rackley above n. 4; H. Kennedy, *Eve was Framed-Women and British Justice* (Vintage, London 1993).

barrier until 1919,<sup>39</sup> as, in order to qualify to practice law they, their lecturers and employers would have had to break the law as it stood,<sup>40</sup> in addition to the socio-cultural barriers they faced. Women in the 19<sup>th</sup> and 20<sup>th</sup> centuries found it difficult, if not impossible, to learn, practice, administer, or teach the law.<sup>41</sup>

### Legally Equal...

Once legal barriers were removed, as was the case in the early part of the 20<sup>th</sup> Century,<sup>42</sup> cultural barriers remained. These proved to be daunting, if not insurmountable for all but the most distinguished female lawyers.<sup>43</sup> The SDA 1919 did not speed female entry to the legal profession, as Nicolson notes, it was 50 years before women began to exceed even 10% of entrants,<sup>44</sup> and even though women were now able to study and practise law with formal legal equality to men, they found it harder to acquire the same professional status.<sup>45</sup> The cultural assumption that women would eventually become wives and mothers,<sup>46</sup> not lawyers, made them seem an unattractive prospect for Chambers or senior partner status in solicitor's firms,<sup>47</sup> and, as more women chose to remain as outsiders to the masculinised culture of the city firms, they did not participate with the same ease in the social network which was essential to eventual promotion. Indeed, in some cases the macho culture of the law firms responded to the presence of women by becoming more masculine, thereby emphasising their 'outsider' status.<sup>48</sup>

As more women began to enter the legal profession and a handful were promoted to the Inner Bar (that is, became QCs or 'took silk') or attained judicial rank,<sup>49</sup>

39 Sex Disqualification (Removal) Act 1919 (hereafter the SDA 1919).

40 B. Hale, 'The House of Lords and Women's Rights or Am I really a Law Lord?' (2005) 25 L.S. 72.

41 McGlynn above n. 34, 39; C. Wells, 'Working out women in Law Schools' (2001) 21 L.S. 116. The latter years of the 20<sup>th</sup> and the early years of the 21<sup>st</sup> Century have admittedly seen greater acceptance of women in the legal and other professions, however, equality is still some way off.

42 above n. 39.

43 Dame Rose Heilbron, the first female Recorder and Old Bailey judge (1956 and 1972 respectively).

44 D. Nicolson, 'Demography, discrimination and diversity, a New Dawn for the British Legal Profession?' (2005) 12 (2) I.J.L.P. 201.

45 McGlynn above n. 34.

46 Dame B. Mills QC quoted in McGlynn above n. 34, 139 'By the time I became a pupil in chambers I was married and had two children ... and this was not much of an asset'.

47 See H. Sommerlad and P. Sanderson, *Gender Choice and Commitment, Women Solicitors in England and Wales and the Struggle for Equal Status* (Aldershot, Ashgate/Dartmouth 1998) 119 'despite evidence of their generally good technical credentials ... (there are) constructions of women as domestic and the solicitor as male'.

48 Nicolson above n. 44.

49 E.g. Dame Elizabeth Lane became the first woman to sit on the High Court in 1962. Similarly, the appointment of female judges in other English-speaking jurisdictions such as Canada and America



the possibility of women as authority figures began to emerge. As Sherry and others have argued, the gender of judges serves an educative function, the sight of a woman in robes ' helps shatter the stereotypes held by male judges, and by lawyers and law students of both genders.'<sup>50</sup> It became possible that women could enter into the legal profession; and in time, participate in both legal and judicial elites. However, the quantity and quality of female law graduates did not correspond to their promotion to the higher ranks. The traditional route to judicial office required practice at the Bar, followed by a period as a Queen's Counsel, and yet, in 1998, only 7% of QCs, or 'silks', were female.<sup>51</sup> As of 2006, this figure remains relatively unchanged at 9%.<sup>52</sup> Women found themselves unable to progress *en masse* to the more prestigious ranks of the profession, and as more women experienced discrimination on the basis of their gender, more began to question why competent women and competent men were not treated the same way. That is, it seemed that only truly 'exceptional' women managed to progress, while less exceptional men managed to do so with less difficulty. As some women were seen to succeed in law, it came to be questioned why more women weren't succeeding in law.

Despite this, some women demonstrably did gain entry to the legal profession and succeed in becoming barristers, QCs and judges, which in itself is an argument for diversity of form, in the sense that without the background of more women entering the legal profession as honorary men, it would be impossible to consider women *qua* women as judges. So where this thesis argues for diversity of thought, it must accept that diversity of form was the first step in introducing the concept of diversity.

### **...but culturally inferior**

As more women began to enter the legal profession, calls for a more diverse legal profession grew stronger. The potential of female lawyers, it was argued, was ignored or devalued by a professional culture of masculinity.<sup>53</sup> Women were assumed to be less committed to their work due to the social expectation that they would become wives and mothers, and thus less likely to be able to participate in the long hours

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served as an example.

50 S. Sherry, 'The Gender of Judges' (1986) 4 Law & Inequality J. 159, 160.

51 McGlynn above n. 34 at 147.

52 General Council of the Bar, Records Office Statistics 2006.

53 Sommerlad and Sanderson above n. 47.

expected of lawyers.<sup>54</sup> Those who did manage to gain a foothold in the legal profession reported isolation and a sense that they were not valued as highly as their male colleagues.<sup>55</sup> Their professional opinions were often viewed with the same disregard as their personal identities, and this, coupled with the perception of women as mothers, exacerbated the already difficult process of advancement in the profession.<sup>56</sup> Once the legal barriers to female participation had been eroded, cultural barriers were raised. A vast amount of anecdotal evidence began to grow, discussing these obstacles and the individual women who had faced them.<sup>57</sup> This resulted in the legal profession being perceived as a bastion of male arrogance, to which women could only gain entry if they behaved in certain ways.<sup>58</sup> Women had achieved formal equality in Great Britain with the passage of the Sex Discrimination<sup>59</sup> and Equal Pay Acts<sup>60</sup> of the 1970s. However, as noted above, this did not translate into cultural equality in the sense that women were still subject to indirect discrimination.<sup>61</sup>

Rather than being perceived as equal in the sense that they were not 'different', it seemed to be the case that successful women were 'exceptional women or honorary men.'<sup>62</sup> Put another way, rather than an inclusive equality which accommodated difference in women's lives or social experience, women were tolerated in the legal profession insofar as they were able to behave like men, and found that their femininity was a dangerous element, to be disguised rather than acknowledged.<sup>63</sup> So, far from being welcomed into professional activity women were expected to conform to biological stereotypes, and adhere to the gendered social roles which had previously defined their place in society as the protectees of male chivalry.<sup>64</sup> Women were thus a

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<sup>54</sup> Sommerlad and Sanderson above n. 47.

<sup>55</sup> Kennedy above n. 38.

<sup>56</sup> Kennedy above n. 38.

<sup>57</sup> Rackley above n. 25 discussing the narratives of gendered discrimination.

<sup>58</sup> See M. Thornton, *Dissonance and distrust, women in the legal profession*. (Oxford University Press, Oxford 1996).

<sup>59</sup> The Sex Discrimination Act 1975, hereafter SDA (1975), made it illegal to discriminate on the grounds of gender against either men or women in employment, training, education or the provision of goods and services etc.

<sup>60</sup> The Equal Pay Act 1970, which came into effect in 1975.

<sup>61</sup> European Directive 97/80/EC was adopted into the SDA (1975) in 2001, outlawing practices which indirectly discriminated against one sex or the other, even though the practices were apparently neutral.

<sup>62</sup> Wells above n. 41.

<sup>63</sup> See Hale above n. 23, 497 discussing the attire of the judge and why it is used, even though 'they deny us our femaleness let alone our femininity'.

<sup>64</sup> For an interesting summary of the gender question see I. Marcus et al, 'Feminist discourse, moral values and the law- A Conversation.' (1985) 34 Buff. L. Rev. 11.

marginalised minority in the legal profession, constrained and silenced through a perception of their inadequacy, or inability to be good lawyers, because they were perceived to be 'different'. Their difference, however, was arguably less in themselves, but in an inability of the legal system to speak to and address concerns that were gender specific—for example the long-hours culture of the workplace, or, from the perspective of women who were subject to the law a tendency to undervalue their experiences, allowing harm to come to them in private, and making few, if any allowances for them in public.<sup>65</sup>

### **Section III**

#### **Different Routes to the Bench**

Numerous studies and reports have highlighted the unequal status of women in the legal profession. Prior to the creation of the JAC, the Department for Constitutional Affairs investigated the perceptions of the judiciary amongst the legal profession, to establish why the pool of applicants was so limited and how best to increase judicial diversity.<sup>66</sup> Some found that being forced to choose between maternal and professional considerations discourages women from applying to the Bench, especially where there is a need to travel.<sup>67</sup> Despite reforms that have taken place within both the solicitor's and barrister's professions,<sup>68</sup> relatively few women remain in the profession long enough to gain the statutory level of experience required for judicial appointment.<sup>69</sup> Similarly, if female barristers or solicitors take a career break to pursue their domestic

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65 The most tragic example of this is 'Battered Woman's Syndrome' and provocation. See J. Bridgeman and S. Millns (eds), *Feminist Perspectives on Law-Law's Engagement with the Female Body* eds (Sweet and Maxwell, London 1998) Chapter 11 for a review of the development of the defence of provocation to incorporate and allow for women who suffer abuse over a long period of time and eventually kill their abuser.

66 Department for Constitutional Affairs (hereafter DCA) '*Judicial Diversity: Findings of a Consultation with Barristers, Solicitors and Judges*' Final Report Opinion Leader Research January 2006 'Why is action required?'; DCA, Consultation Paper, '*Constitutional Reform: a new way of appointing judges*' CP10/03 July 2003 and Summary of Responses to the Consultation Paper January 2004; Sir Leonard Peach, '*An Independent Scrutiny of the Appointment Processes of Judge's and Queen's Counsel in England and Wales, A Report to the Lord Chancellor.*' Lord Chancellor's Department Research Series No, 2/00, June 2000.

67 DCA Opinion Leader Research above n. 66, 34.

68 The Bar Council has produced an 'Equality and Diversity Code for the Bar' 2004 and the Law Society Handbook '*Delivering Equality and Diversity; A Handbook for Solicitors*' 2004.

69 Or feel that career breaks / a delay in joining the legal profession to have children counts against them in terms of work experience above n. 66 Opinion Leader Research 4.4.5. Work Issues , 37.

lives they can find their return to work difficult. Again, reforms have taken place to make this process easier, however the nature of the legal profession is competitive, so that constant activity and presence is required in order for a barrister or solicitor to retain a client base and 'be known' in order to be a valuable asset to the set of chambers or solicitor firm from which the lawyer operates. So, for these reasons it can be argued that the barriers to achieving a more balanced judiciary in terms of ethnicity and gender are not exclusively related to the image of the judiciary as a self selecting group of old white men, who must be very hard-working, almost preternaturally intelligent, and dedicated to the law to the extent that they must give up their family life to sit on circuit-that is, the superhero image of the judge.<sup>70</sup>

## **Cultural Barriers**

However, the research also uncovered several reasons which could be directly related to the image of the Herculean or superhero judge. Further up the judicial appointments ladder, the appointments system did not operate with transparency, nor did it conform to standard employment procedures such as advertising vacant positions and publication of criteria.<sup>71</sup> Visibility was a key factor to promotion, so many women who did not frequent the 'old boy's network' or practise as barristers in high profile cases were frequently passed over for promotion to the bench. This had led to a more homogeneous pool of applicants, as many women and ethnic minorities felt that they would not be appointed as they were not of the same mould as the rest of the judiciary.<sup>72</sup> There was a clear feeling that 'They wouldn't want someone like me.'<sup>73</sup> This reflected a sense of 'otherness', the image of the superhero judge was exclusive of other identities. Those who were qualified to apply, but did not 'look' the part, felt that they would be discriminated against or passed over.

There was also an extent to which the image of the superhero judge was perceived less as an aspirational, idealised model, and more an outmoded conception of

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70 DCA Opinion Leader Research above n. 66 4.4.6 Overview 'The discussions indicate the perceived crucial importance of fitting the mould or fitting into the current judicial culture'.

71 See criticisms and recommendations for reform made by Kennedy n. 38 above.

72 DCA Opinion Leader Research above n. 66 4.4. Barriers to Applying.

73 DCA Opinion Leader Research above n. 66 4.2.1 Current Perceptions – How the Judiciary is seen now.

the judge and judicial role. Those who felt they were 'different' to the image of the judge did not wish to have to conform to the 'superhero' ideal. As they were not white, male, and Oxbridge educated they not only felt that they would not 'fit in' to the judicial mould but that they did not wish to do so.

#### A 'Wealth of Talent'<sup>74</sup>

'The senior members of the judiciary still believed – and perhaps continue to believe – that the best training for judicial office was through a long career at the Bar.'<sup>75</sup> Research conducted by the DCA found that barristers were more likely to apply than any other group, and the judiciary was seen by some as the end, not the beginning of a career.<sup>76</sup> Although barristers were attracted by the prospect of a judicial pension and some welcomed more certain hours and secure salary, they also felt that to apply for judicial office was to trade prestige for pay.<sup>77</sup> As illustrated above, there are a very limited number of female QCs, so it is unsurprising that, as barristers were more likely to apply for judicial office than any other legal professional group, the applications from women and ethnic minorities were limited. If female lawyers had reached the rank of QC, they might prefer the higher salary offered by a distinguished career at the Bar, but they might also be unwilling to benefit from the kind of prestige which association with the 'pale male' judiciary might give them. Put another way, if male barristers found the position of the judge attractive on the basis of its prestige, not salary, then female members of the Inner Bar might be less attracted to the Bench because they were not interested in becoming members of an essentially male elite.

This unwillingness to apply for judicial office suggested that the Bench was

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<sup>74</sup> This complaint was made by the Lord Chancellor regarding the fact that few applications were received from potential female and ethnic minority candidates, thus denying the judiciary a wealth of talent. His response at the time was to encourage such applications with the exhortation 'Don't be shy, apply.' Lord Chancellor, 'Speech to the Association of Women Barristers' The Barbican, London 11<sup>th</sup> February 1998, available at [www.lcd.gov.uk/speeches/1998/1998fr.htm](http://www.lcd.gov.uk/speeches/1998/1998fr.htm). The trend for female and ethnic minorities to underestimate their likelihood of being selected also became clear in the DCA Opinion Leader Research at n. 66 above, 'whereas women cited lack of confidence as a main barrier, the men were more likely to avoid application because of the risk of being rejected, i.e. it was less a concern that they weren't good enough, and more a concern that their skills would not be recognised.' 4.4.7 Overview-white males, 41.

<sup>75</sup> Hale above n. 23.

<sup>76</sup> DCA Opinion Leader Research above n. 66 4.1 Key Findings-Future plans, 11.

<sup>77</sup> DCA Opinion Leader Research above n. 66 4.4.5 Work Issues, 35.

perceived, not only a closed institution, but an unattractive prospect for employment. Some applicants weren't just 'shy' to apply,<sup>78</sup> they perceived the judiciary as an outmoded relic of a bygone era. The feeling that 'they' wouldn't want someone 'like me' was matched by a sense that 'I' wouldn't want to become 'someone like them'. In this sense, women and ethnic minorities were excluded by cultural barriers, and had reacted by creating cultural barriers of their own. This belief was reinforced by confusions over eligibility for judicial office, as many eligible candidates did not realise they were qualified.<sup>79</sup> This does not deny the power of the image of the judge to exclude different identities, it remains at the forefront of the mind, evoking the myth of the 'superhero' judge. Rather, this suggests that the 'reluctance' of women and ethnic minorities to apply for judicial office is in part related to a perception of the judiciary as unwelcoming. A superhero judge wants a side-kick, not a rival. The DCA's research found that 'Overall, advantages to the entering the judiciary did not spring to mind for most participants....This indicates how little the judiciary is seen to 'sell' itself....there is a strong opportunity for the DCA to market the judiciary and highlight the positive aspects of judicial appointment.'<sup>80</sup>

## Reform

Against a background of calls for a more transparent and equitable judicial appointments system, and changes to the 'macho' culture of the Bar and Solicitor's profession, it was announced in 2003 that the government would undertake the next step in constitutional reform.<sup>81</sup> It had begun with the introduction of human rights into the UK.<sup>82</sup> The reform continued with the creation of a Supreme Court,<sup>83</sup> the intended abolition of the office of Lord Chancellor, and a review of the appointments system for Queen's Counsel and the judiciary.<sup>84</sup> This resulted in the CRA 2005, which, for the first time, involved a statutory recognition of the importance of diversity within the

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78 Lord Chancellor above n. 74.

79 above n. 66 'The key issue is .... that a great number of respondents (particularly solicitors) had simply never considered the judiciary as a possible career route.' Executive Summary at 4.

80 DCA Opinion Leader Research above n. 66 Perceived Advantages of Entering the Judiciary 4.3, 18 at 20.

81 K. Malleon, 'Modernising the Constitution, completing the unfinished business' (2004) 24 L.S. 119.

82 Human Rights Act 1998.

83 As established in the CRA 2005, see also Malleon above n. 81.

84 Resulting in the creation of the Commission for Judicial Appointments which was replaced by the JAC.

judiciary.<sup>85</sup>

The need for reform of the judicial appointments system came to be seen as a matter requiring urgent action. Despite greater parity between the sexes in entry figures for legal education,<sup>86</sup> it became apparent that women were concentrated in the lower ranks of the legal profession, as was discussed above. This was attributed to many factors, such as gendered roles, cultural discrimination, and the so called 'presenteeism' culture in many big firms which forced women to choose between their domestic responsibilities and their work life.<sup>87</sup> It was noted that though women were well represented in legal education, 'women's greater representation has yet to translate to equality.'<sup>88</sup>

The necessity for judicial diversity was seen as being vital, not on the grounds of the potential of difference, but on the grounds of equity and legitimacy.<sup>89</sup> The Act sought to make the judicial appointments process more transparent and increase judicial diversity through the creation of a commission with responsibility for recommending candidates for judicial appointments to the Lord Chancellor. Consequently, the JAC was established in April 2006, with the remit of encouraging diversity whilst remaining committed to the principle of merit. The distinction that was drawn between diversity and merit seemed to be an attempt to counter the stigma of 'affirmative action' and enable judges to defend themselves against charges of 'tokenism'. Already, it had been noted that the progression of women in the Bar and solicitors' profession had resulted in jokes being made about the likelihood of a white male barrister being promoted to the judiciary against a female or ethnic minority applicant,<sup>90</sup> and the fact that male legal practitioners felt themselves to be discriminated against by the diversification of the legal profession, even though the number of female judges and lawyers has not yet reached parity.<sup>91</sup>

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85 CRA 2005 s63.

86 McGlynn above n. 34.

87 See e.g. Sommerlad and Sanderson above n. 47.

88 Nicolson above n. 44, 203.

89 K. Maleson, 'Justifying Gender Equality on the Bench, Why Difference Won't Do.' (2003) 1 Fem. L.S. 11.

90 DCA Opinion Leader Research above n. 66 4.2.2. 'It's a standing joke, well I'm not a female from an ethnic minority so they won't be interested in me. That's certainly something that's said flippantly in the bar.' at 17.

91 Women are constitutive of less than 10% of the senior judiciary (being High Court or above) See Equal Opportunities Commission 'Sex and Power; who runs Britain? 2007'. Available online [www.eoc.org.uk](http://www.eoc.org.uk) last accessed 27th January 2008. Also see [www.eoc-law.org.uk](http://www.eoc-law.org.uk).

## **The Judicial Appointments Commission**

The system of the 'tap on the shoulder' had given rise to an homogeneous judiciary, as well as a closed appointments system which had a negative effect on public trust. Reform of this system was an aim for several administrations, however it was not until a 'Thursday afternoon Cabinet reshuffle'<sup>92</sup> that the process gained impetus. Consultations, reports and research into women, ethnic minorities and others in the judiciary were commissioned and reviewed,<sup>93</sup> and in the CRA 2005 the JAC was established.<sup>94</sup> Its predecessor, the Commission for Judicial Appointments, noted;

A key challenge facing the Judicial Appointments Commission from April 2006 is to increase the diversity of those appointed to judicial office whilst maintaining and enhancing the principle of selection on merit. A diverse judiciary is more likely to be superior to a non-diverse judiciary, especially if it demonstrates greater insights and understanding of diversity issues....A judiciary that is reflective of society is consistent with democratic principles and the rule of law. It will improve the quality of judicial work and lead to greater public confidence in the administration of justice.<sup>95</sup>

As Malleon argued 'The rationale for the establishment of a Commission must be that it will guarantee the independence of the system from inappropriate politicisation, strengthen the quality of the appointments made, enhance the fairness of the selection process, promote diversity in the composition of the judiciary and so

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92 Malleon above n. 89.

93 Malleon above n. 89.

94 CRA 2005 s 61.

95 Commission for Judicial Appointments, *Women in the Legal Profession and the Judicial Appointments Process* Introduction p1. Available [http://www.cja.gov.uk/files/Discussion\\_Paper-Women\\_in\\_the\\_Legal\\_Profession.doc](http://www.cja.gov.uk/files/Discussion_Paper-Women_in_the_Legal_Profession.doc) accessed 30<sup>th</sup> October 2007.



rebuild public confidence in the system.<sup>96</sup>

The literature on judicial diversity was careful to refer to a 'reflective' rather than 'representative' judiciary in order to avoid this problem. It is arguable that the distinction between 'representative' and 'reflective' is a false one, and though judicial diversity is undoubtedly a worthwhile ideal, it cannot be justified by a need for 'reflectiveness' any more than it can be justified by 'essentialising' calls for difference on the bench. The argument against essentialism is well rehearsed, but at its core is the belief that it is wrong to expect someone to conform to their socially constructed roles on account of their biology.

The argument against a 'reflective' judiciary is more subtle. It is essentialist, in the first instance, to expect an individual to reflect any aspect of society based on his or her social identity. A reflective judiciary thus falls prey to the same argument as a representative judiciary, it expects behaviour, or at least the performance of a function, based on social identity. At the same time, the judge is expected to remain neutral between the parties.<sup>97</sup> The ideal role of the judge is seen to conflict with the rationale behind a more diverse judiciary – diversity and merit are again in conflict.

The next section discusses women in the legal profession with a specific focus on the idea of difference in judging. It discusses the problems of difference when compared with the Herculean image of the judge. If the ideal judge is the detached, neutral arbiter, then the question posed by diversity of form is what difference can difference make, and what difference could difference be allowed to make?

#### **Section IV**

#### **Difference and Diversity, Arguments for Women in the Legal Profession**

In 1982 Gilligan published *In a Different Voice*.<sup>98</sup> Her work challenged the

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96 Malleon above n. 89.

97 As Human Rights Act 1998 Art 6 demands and the 'core qualities' the JAC laid out require.

98 C. Gilligan, *In a Different Voice-Psychological Theory and Women's Development*. (2<sup>nd</sup> ed. Harvard

widely held belief that there was one 'right' way of evaluating moral reasoning.<sup>99</sup> Gilligan argued that, rather than the same type of moral reasoning being developed at different rates, different types of moral reasoning developed at the same rate.

'The failure to see the different reality of women's lives and to hear the differences in their voices stems in part from the assumption that there is a single mode of social experience and interpretation.'<sup>100</sup>

Throughout the narrative of Gilligan's work she articulates difference positively.<sup>101</sup> Rather than constructing 'different' as synonymous with 'deviant' *In a Different Voice*<sup>102</sup> observes and records different moral methods, or ethics, which Gilligan describes as the ethic of justice, and the ethic of care. In Gilligan's sympathetic consideration of the moral lives of her subjects a more profound analysis emerges, and difference is re-imagined as potential, creating space for understanding. It became possible to imagine what difference difference might make, as opposed to silencing deviance.

### **In 'a' different voice**

The implications of *In a Different Voice* were intuitively attractive to those arguing for greater female participation in public life generally and in the legal system specifically. The implications for adjudication were also important.<sup>103</sup> If one ethic had dominated the process of creating and applying legislation, then introducing an alternative way of considering moral problems could redress some of the perceived failings of the justice system. Female experience of law as 'a man's world', in which women had been marginalised, encouraged the misappropriation of Gilligan's work as an argument for women's morality as opposed to an argument against dominant understandings of moral decision-making and development.<sup>104</sup>

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University Press, Cambridge, Mass. 1993).

99 As expressed by Lawrence Kohlberg in (inter alia) *The Philosophy of Moral Development, Stages and the Idea of Justice* (Harper and Row; New York 1981) as cited by Gilligan above n. 98.

100 Gilligan above n. 98, 173.

101 E. Rackley, 'From Arachne to Charlotte: an Imaginative Revisiting of Gilligan's *In A Different Voice*' (2007) 13 *Wm. and Mary J. of Women and the L.* 751.

102 Gilligan above n. 98.

103 Sherry above n. 50, 164; C. Menkel Meadows, 'Portia in a different voice; Speculations on a woman's lawyering process' (1985) 1 *Berkeley Women's L.J.* 39.

104 Gilligan above n. 98, 38.

The research was thus used as a platform from which to criticise all aspects of the legal profession, from education to adjudication, as at best, essentially one sided, and at worst, male dominated and exclusive of female experience.<sup>105</sup> Gilligan herself found cause to regret the misunderstanding or strategic deployment of her work as an argument for women's morality. Later describing her work, she tried to explain the intricacies of her research. 'I was not comparing women with men. Rather....I was comparing women with theory.'<sup>106</sup> As Tronto argues 'The equation of Gilligan's work with women's morality is a cultural phenomenon and not of Gilligan's making.'<sup>107</sup>

### **The danger of 'difference';**

The idea that men and women have different approaches to law and legal reasoning, dependent on an internal and gendered morality, also attracted criticism of her research, despite being an erroneous interpretation of Gilligan's work. Critics accused her of essentialism,<sup>108</sup> and of focusing on the experience of white, privileged women at the expense of other groups who suffered discrimination. Despite Gilligan's repeated assertions to the contrary, it was felt that the association of a particular method of reasoning with gender threatened the liberal legal feminist project of an equal society.<sup>109</sup> This interpretation of Gilligan's work – as a potential threat to social equality, was a misunderstanding of the application of the term 'different', and a misconstruction of her theory. It could be argued that, rather than such criticism resulting from flaws in her work, the criticism was designed to defend against the reduction of female identity to a set code of behaviour, an 'ethic of care.'<sup>110</sup> At the heart of such concerns lay the fear that if a truly feminine identity was established, this could be used to justify further

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105 R. Auchmuty in S. Scott-Hunt and H. Lim (eds.), 'The Fiction of Equity' in *Feminist Perspectives on Equity and Trusts* (Routledge Cavendish, London 2001) 3.

106 Gilligan, 'Letter to Readers' above n. 98 published in 1993 edition.

107 J. Tronto, 'Beyond Gender Difference to a Theory of Care' (1987) 12 *Signs: J. Women in Culture and Soc'y*. 646.

108 Such reductive and simplistic interpretations are what Frug described as 'crude Gilliganism' M.J. Frug, 'Progressive feminist legal scholarship; can we claim "A Different Voice"?' (1992) 15 *Harv. Women's L.J.* 37, 50.

109 Numerous articles and books reflect feminist discomfort with the use of the term 'different'. As Fuchs-Epstein expressed it 'I am particularly concerned about the reversal of the orientation toward equality and the renewal of the prejudices of the past underscoring differences between women and men'. C.Fuchs-Epstein, 'Faulty Framework; Consequences of the Difference model for Women in the Law' (1990) 35 *N. Y. L. Sch. Rev.* 311.

110 Gilligan above n. 98.

discrimination against women.<sup>111</sup> This fear arguably reflected the type of equality that women felt they had achieved. That is, a formal equality, which allowed female participation on the basis that they could play a male game. Against this background, the image of 'Amy's web'<sup>112</sup> became a cloying, essentialist trap for many commentators,<sup>113</sup> who saw the danger in associating behaviour, however loosely, with gender, felt that they risked even the uneasy relationship with equality they had achieved by defining themselves as different. The effect of the misappropriation of Gilligan's work was to theoretically legitimise reified cultural and biological archetypes, as expressed in the ethic of care, into an expected code of behaviour for female lawyers. Theorists so anxious to avoid essentialism grounded the debate in terms of whether or not there was a truly feminine identity. The terror of being anchored to a concept of femininity meant that Gilligan's central theme was arguably lost in the 'quagmire of essentialism.'<sup>114</sup>

### **The potential of 'difference';**

The fear that difference would be perceived as deviance was a reasonable one, given the history of women's exclusion and marginalisation within the legal culture and professions. A more optimistic view, however, also took hold in the minds of some commentators who embraced the potential of Gilligan's work. Carrie Menkel Meadows,<sup>115</sup> Martha Minow,<sup>116</sup> and others, viewed the idea of difference as a challenge to dominant models of thought rather than as an obstacle to the feminist project of equality. They found that, far from threatening women with silence through difference,

111 This would undermine "equality feminism" expressed by Gilligan as 'equal access for women to privileges from which they have been traditionally barred because they are women' C. Gilligan, 'Getting Civilised' (1994) 63 Fordham L. Rev. 17, 20.

112 In Gilligan's work Heinz's dilemma was presented to two eleven year old children, of a similar level of intelligence and social background. They were asked if Heinz, whose wife was extremely ill, should steal a drug he could not otherwise afford from a pharmacist. Amy's response to the dilemma was characterised as seeing the world as a 'web' of relationships or care, whereas Jake was seen to employ hierarchical logic in his answer. See for example; P. Spiegelmann, 'Integrating Doctrine, Theory and Practice in the Law School Curriculum: the Logic of Jake's Ladder in the context of Amy's Web.' (1988) 38 J. Leg. Ed. 243, 250 also see Chapter 3.

113 See Rackley above n. 101, 753.

114 Rackley above n. 101, 753.

115 C. Menkel Meadows, 'What's Gender got to do with it? The Politics and Morality of an ethic of care.' (1996-1997) 22 N.Y.U. Rev L. & Soc. Change 292.

116 M. Minow, *Making All the Difference, Inclusion, Exclusion and American Law* (Cornell University Press, Cornell, 1991).

Gilligan's sympathetic portrayal of what, in a lawyer, could traditionally be perceived as 'weakness'<sup>117</sup> could in fact be used to instigate reform of the legal profession, to promote alternative dispute resolution, rather than focusing on an adversarial trial structure. As Menkel Meadows work suggests, courts expressed the dominance of the ethic of rights through an adversarial system.<sup>118</sup> The competitive structure of a trial, which placed individual rights in conflict, resulted in a binary resolution of disputes. Participants were found right or wrong, innocent or guilty, through the application of abstract rules to a scenario which was devoid of context.

The ethic of care, unlike the ethic of rights, approaches conflicts with the aim of resolution, rather than trying to establish winners and losers in a contest of rights. Expressing itself in moral language<sup>119</sup> the ethic of care perceives a world in which individuals are not wholly autonomous but participants in a network of relationships upon which all are dependent for survival.<sup>120</sup> The ethic of care views disconnection and lack of understanding with a sense confusion and concern, whereas the ethic of rights, focusing on a binary calculation, sees co-dependence as a form of weakness, and sees the primary duty as being to the self.

The expectations of the effect of the ethic of care, in a legal system dominated by the ethic of rights, were therefore extremely high in the minds of some commentators.<sup>121</sup> Spiegelmann argued that the nature of legal education was such that it inculcated the law student with the logic of Jake's ladder at the expense of Amy's web.<sup>122</sup> He discussed the possibility of including Amy's method of communication, her compassionate web into the traditional program of legal education in order to broaden and humanise the legal mind. Put another way, he argued for a compromise between the ethic of care and the ethic of rights, in order to improve the ethical elements of the system of legal education.

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117 Such as traditionally feminine values of empathy, care, and dispute resolution.

118 C. Menkel-Meadows, 'The Trouble with the Adversary System in a Post-modern, Multicultural World' (1997) 38 Wm and Mary L.Rev 4, 5.

119 See Gilligan above n. 98 73-74; Gilligan in I. Marcus et al, 'Feminist discourse, moral values and the law-A Conversation.' (1985) 34 Buff. L. Rev. 11.

120 Gilligan above n. 98.

121 The ethics which and their potential application to the legal system, have inspired articles, symposiums, conferences and comments too numerous to list here. The sense that Gilligan's work has been exhausted by academic comment is a result of this. See Rackley above n. 101.

122 Spiegelmann above n. 112.

### **The effect of 'difference';**

The use of Gilligan's articulation of difference as a theoretical base for the justification of greater female participation in the legal system is evidence of the effect it had in terms of validating the female lawyer. Women, excluded from the legal profession on the basis of difference, now found a new justification for their arguments for inclusion. It was not merely that the exclusion of women was inequitable, but that women could provide a more contextualised, caring kind of justice. In doing so, they could contribute to, rather than detract from or be damaged by, the legal process.<sup>123</sup> The effect of Gilligan's work was to make their difference valuable, and in doing so, to provide a figure with whom women in the law could identify, and find justification for their own identity as 'different'. The ethic of care, as an expression of empathetic and contextualised judgment, represented virtues traditionally associated with femininity. Gilligan's account of the ethic of care seemed to validate the experiences of women who felt marginalised, and expose the potential of a more diverse legal profession. The difference that *'In a Different Voice'* made continues to have an effect, women are still discussing its impact, and theorising about the possibilities of a more diverse judiciary in terms of the difference women could make.<sup>124</sup>

### **Conclusion**

The domination of the judiciary by the white male judge has led to the exclusion of the female judge.<sup>125</sup> As of 2007, the number of women in the senior judiciary (that is, the High Courts and above) was at 9.8%, compared to an average of 24% of female participants in public life.<sup>126</sup> It has been estimated that at the current level of female

<sup>123</sup> See *'In Re Goodell'* above n. 37.

<sup>124</sup> The body of literature referred to throughout this thesis reflects this uneasy relationship with difference. We still discuss difference, and we still are at once attracted to and wary of it.

<sup>125</sup> As in Chapter One, the 'female' judge represents the specific case of 'the other' under examination.

<sup>126</sup> Equal Opportunities Commission above n. 91.

appointees to higher judicial office it will take forty years before a parity in numbers is achieved.<sup>127</sup> It is this imbalance, amongst others, which the JAC is charged with redressing whilst remaining committed to the principle of merit in judicial appointments.<sup>128</sup>

Yet, as this chapter examined, the concept of judicial merit has not altered to reflect changes in the judicial role. It reflects the Herculean image of the judge, an understanding of justice as the neutral application of laws to facts by an unbiased and apolitical decision-maker, with no ideological values of his own. Its superiority to the goal of judicial diversity reflects the uneasy coupling of these two aims. It leaves the 'different' judge navigating the demands of neutrality when faced with the stigma of tokenism.<sup>129</sup> It weakens the decisions of the 'different' judge, whilst strengthening the ideal of the judge as superhero. In doing so, it confirms an outmoded ideal of the judge, reflecting a conception of the judicial role which is no longer, if it ever was, accurate.

In doing so, it weakens the potential of the judge and the judiciary to perform an enhanced role in society, not merely to represent the aesthetic of multiculturalism and reflect the increasing levels of gender equality,<sup>130</sup> but to consider and include identities which do not have the benefit of representation. In other words, judicial diversity should allow not simply the inclusion of women's issues or minority rights, but should allow for the inclusion of diversity as an element of merit. To do so would be to recognise, in statute, that the difference difference can make is to recognise and correct the erroneous assumption that there is a single method of interpretation,<sup>131</sup> of approaching reasoning, that all judges are alike and that all judges should, or even could, be politically neutral.<sup>132</sup>

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127 Equal Opportunities Commission above n. 91, 8 – however, comparatively it will take 60 years to ensure equality in terms of FTSE directorships, and at least 200 years to have an equal gender balance in Parliament.

128 CRA 2005 s63 and 64.

129 DCA Opinion Leader Research above n. 66.

130 This thesis makes no assertions about how satisfactory gender equality in society is, generally, at the time of writing, but adopts the uncontroversial position that the position of women in society has improved in many ways over the course of the 20th Century, and will hopefully continue to do so.

131 Gilligan above n. 98.

132 Kennedy above n. 4.

### **Chapter Three**

#### **What Difference does Difference Make?**

##### **Introduction**

In the previous chapters the concepts of diversity of form and diversity of thought were discussed with reference to the statutory requirement for judicial appointments to be made on merit with consideration given to the need to encourage judicial diversity. Arguing that judicial diversity has so far been viewed in terms of gender, race and class it was suggested that the barrier to judicial diversity consists not only of institutional and cultural barriers to diversity but of an understanding of the ideal judge and the judicial role which is limiting. It was further argued that while attempts to reform the judicial appointments process were and are welcome, the image of the Herculean judge as the definition of judicial merit is still operative on attempts to achieve judicial diversity. Chapter Two discussed the exclusion of women from the legal and judicial institutions as a specific example of the 'other'.

This Chapter takes this discussion further. Its principal focus is on Baroness Hale's reasoning process. It does so with the specific aim of considering the potential of diversity of thought as opposed to diversity of form. In doing so it uses Gilligan's analysis of moral reasoning from *In A Different Voice*.<sup>1</sup> This highlights her difference from the other Law Lords in order to suggest that the flaw in diversity of form is the same flaw which emerged in arguments for greater female participation in the legal profession based on difference. In expecting the individual to conform to or reflect a biological, racial or sexual stereotype the potential of reform is limited.

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<sup>1</sup> C. Gilligan, *In a Different Voice-Psychological Theory and Women's Development*. (2<sup>nd</sup> ed. Harvard University Press, Cambridge, Mass. 1993) discussing the Heinz Dilemma T 25. See Sections I and II below.



This chapter examines the potential impact of greater judicial diversity of thought through an analysis of Baroness Hale's opinion in *R v Hasan*.<sup>2</sup> This chapter uses two methods of analysis in exploring Hale's decision-making process and the possibilities it offers. With the aim of identifying her difference, this chapter borrows Gilligan's examination of difference from *In a Different Voice*<sup>3</sup> to analyse Hale's method of reasoning and compare it with that of Lord Bingham. Having made the argument that Hale's approach to legal issues and legal reasoning diverges from that of the other law lords, her argument is then analysed as a narrative. Using this humanistic approach,<sup>4</sup> this chapter examines the symbols and strategies that Hale uses to more fully explore her opinion.

In Section I this chapter explains the Heinz Dilemma as discussed in Gilligan's work and discusses the scenario as analogous to the defence of duress which was raised in *Hasan*. It explains more fully the reasons why *Hasan*, as opposed to any other issues which have been raised since Baroness Hale was appointed to the House of Lords, has been chosen as the principal focus of this chapter. In an examination of the history and expansion of the defence of duress the analogy with the Heinz Dilemma is clarified.

In Section II Gilligan's articulation of difference is employed in an analysis of *R v Hasan*.<sup>5</sup> In the use of this method a caveat must be stated, although a difference can be discerned, this difference is not claimed as being due to the gender of the participants. The method is employed with the intention of articulating the difference between the two Law Lords, and in this way the image of Jake and Amy is used as an illustration of the potential of judicial diversity when conceived in terms of diversity of thought. Section II examines Lord Bingham's opinion, and Section III discusses Baroness Hale's opinion. Consequently, Section IV briefly discusses the potential sources of their difference.

Section V discusses the symbols and narrative strategies employed by Hale in her opinion. In this section it is argued that it is not principally her biology which creates the 'difference' she makes but rather her academic and professional background.

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2 *R v (Hasan (Atyach))* (hereafter referred to as *Hasan*)[2005] UKHL 22, 2 AC 467.

3 Gilligan above n. 1.

4 See R. West, *Narrative Authority and Law*. (University of Michigan Press, Ann Arbor 1993).

5 As above n. 2.

These influences on her thought and approach to the issues raised in *Hasan* shape the substance of her argument. This narrative analysis is intended to illustrate her inclusion of the Other within the scope of the defence of duress. This section also indicates the universality of her approach, inasmuch as whilst she approaches the problem through the narrative of the battered wife, the defendant in question is male. This highlights the fact that the problem of the Other is gender neutral.

The opinions are examined comparatively through the icon of Jake and Amy. Subsequently, a more literary, narrative based critique is used to highlight the stylistic difference between the two judgments as well as examining Hale's use of narrative to challenge established legal concepts such as the ordinary, reasonable man. A brief review of her jurisprudence on other issues will argue that this is not an isolated incident, but rather a strategy deployed to include the 'other' in legal discourse. This concern for the other, and the ability to skilfully introduce his concerns and interests, is one of the arguments made for a more professionally balanced Supreme Court.

## **Section I**

### **Jake and Amy in the Law Lords?**

The Heinz Dilemma<sup>6</sup> is utilised in this chapter to discuss the difference between Baroness Hale and Lord Bingham. It has been compared to the case of *R v Hasan* because it is in this case that her difference can be investigated to discuss the value of difference as well as its source. The issues of duress which are at play in the Heinz dilemma are analogous to those which Hale identifies in her opinion in *Hasan*. The purpose of using the Heinz Dilemma and Gilligan's analysis of it is to compare Hale's difference in terms of diversity of form and diversity of thought. In short the question this chapter asks centres around the source of Hale's difference. Can her decision making process be attributed to her biology in a reductive example of 'crude Gilliganism',<sup>7</sup> or can it be examined as an example of the potential of diversifying the judiciary in terms of diversity of thought? The intellectual differences between Hale and Bingham are thus to be examined in the hope of determining whether they differ

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6 Gilligan above n. 1, 25-26.

7 M. J. Frug, 'Progressive feminist legal scholarship; can we claim "A Different Voice"?' (1992) 15 Harv. Women's L.J.37, 50.

because of their gender and the thought processes associated with their biological characteristics or whether it is more likely to emerge from their professional backgrounds.

Lord Bingham is a barrister with a long history of work within the Bench and the Bar.<sup>8</sup> A talented and able lawyer, he has spent decades within the Courts and as a barrister. In this chapter, his method of analysis is compared to the male 'voice' in Gilligan's work, however, this chapter argues that his reasoning process is influenced by his experience, and not his gender. Baroness Hale, as well as an able lawyer, is a noted academic. She has written several thoughtful opinions since she was appointed to the House of Lords Appellate Committee in 2004, but this is in addition to her academic activities. Having published books on women in the law<sup>9</sup> and the law of mental health,<sup>10</sup> she has also worked in the Law Commission.<sup>11</sup> A small sample of her work evidences the breadth of her knowledge and skills.<sup>12</sup> She is not only one of our more 'thoughtful' Law Lords,<sup>13</sup> she is a noted academic with a background in law reform and an understanding of discrimination, women's issues and family law.

In Gilligan's work Heinz's dilemma was presented to two eleven year old children, of a similar level of intelligence and social background.<sup>14</sup> They were asked if Heinz, whose wife was extremely ill, should steal a drug he could not otherwise afford from a pharmacist. Jake, viewing the hypothetical dilemma as a sort of 'math problem with humans'<sup>15</sup> decided that Heinz should steal the drug, because 'life is worth more than property.' Amy, fighting the intellectual limits of the hypothetical, could not understand why the pharmacist did not simply give the drug to Heinz, or arrange some alternative method of payment which he could afford.<sup>16</sup> Unlike Jake, she included the concerns of the wife in the scenario, extending the problem beyond the original

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8 See [www.tombingham.com/cv.php](http://www.tombingham.com/cv.php) last accessed 18th March 2008.

9 B. Hoggett, S. Atkins, *Women and the Law* (Blackwell, Oxford, 1984).

10 B. Hoggett, *Mental Health Law* (Sweet and Maxwell, London, 1996).

11 She was appointed in 1984, E Rackley, 'Difference in the House of Lords' (2006) 15 S.&L.S. 163.

12 Such as her academic articles which have been referenced throughout this thesis, as well as her Chancellorship of the University of Bristol, and her appointment as a Visitor of Girton College, Cambridge. Her professional background has involved a lengthy period as a Law Commissioner, work on the HFEA, as well as a marked interest in family law, discrimination law and jurisprudence.

13 Anonymous quoted in Rackley above n. 11.

14 Gilligan above n. 1, 25.

15 Gilligan above n. 1, 25.

16 Gilligan above n. 1, 29.

framework, from a binary equation to a web of relationships.<sup>17</sup>

Jake advocates that Heinz steal the drug, believing that a judge would understand Heinz's action.<sup>18</sup> Amy, by contrast, seeks to provide a resolution to the dilemma which requires no criminal behaviour by Heinz when his actions are motivated by care for his wife.<sup>19</sup> Both agree, (as the law lords do in *Hasan*), on the substantive outcome, that Heinz should procure the drug for his wife.<sup>20</sup> Amy takes it for granted that Heinz will act, motivated by concern for his wife, whereas Jake considers Heinz's options, and decides that, both morally and in his own interests,<sup>21</sup> Heinz should act, and steal the drug.<sup>22</sup> The difference between the two, as in *Hasan* is in the way they approach the problem and the understandings that are revealed in their answers.<sup>23</sup>

The circumstances of the dilemma which motivate Heinz to steal are analogous to the circumstances necessary for a defendant to raise a defence of duress. If, instead of an illness threatening Heinz's wife with death or serious injury, a third party was the source of the threat, this would provide a basis for the defence.<sup>24</sup> The defence of duress is 'a concession to human frailty',<sup>25</sup> when operating under a threat from a third party. The threat must be operative on the mind of the defendant, so as to coerce his will, but it need not be imminent.<sup>26</sup> The defence is also available to the defendant where the threats were not directed at him but at a loved one or person for whom he was responsible. The defendant must take all reasonable steps to escape the threat and avail himself of such protection as the police or other officials can provide.<sup>27</sup> The test for duress is whether the threat was so grave as to cause a reasonable person, sharing the characteristics of the defendant, to act as he did.<sup>28</sup> However, the defendant is not permitted to avail himself of the defence of duress where he had, or ought reasonably to have had foreseen the risk of being forced to commit any act due to threats of violence

17 Gilligan above n. 1, 28.

18 Gilligan above n. 1, 29.

19 Gilligan above n. 1, 28.

20 Inasmuch as both agree that the appeal should be denied.

21 Gilligan above n. 1, 26.

22 Gilligan above n. 1, 26.

23 Gilligan above n. 1, 35.

24 As expressed in *R v Heath* [2000] Crim. LR 109.

25 J. Horder (discussing Lord Griffiths' opinion of duress in *R v Howe* (1987) 2 WLR. 85 Cr. App. R 32)

J. Horder, 'Law Commission Report on Offences Against the Person and General Principles: Part 2 Occupying the Moral High Ground? The Law Commission on Duress' (1994) Crim. LR 334, 336.

26 *R v Abdul-Hussain and Others* [1999] Crim. LR 570.

27 *R v Hudson* [1971] 2 QB 202, [1971] 2 All ER 385.

28 *R v Howe* (1987) 2 WLR, (1987) 85 Cr. App. R 32.

or of violence itself- this was the issue which was decided in *Hasan* .

Gilligan's use of the Heinz dilemma can be replicated in *Hasan*, in which Baroness Hale and Lord Bingham disagreed over the proper interpretation of duress. The difference between the two opinions can be compared with the children's response to the question of whether Heinz should steal from the pharmacist. If, again, we imagine Heinz to be acting out of a fear of hurt or injury being inflicted on his wife by a third party rather than a disease, the analogy is easily made, and provides a method for analysing the reasoned opinions of Baroness Hale and Lord Bingham, and for highlighting the difference between them. It is also noted that duress of circumstances is a 'general defence to the same extent and subject to the same conditions as duress by threats.'<sup>29</sup> The facts of the case are stated below.

### ***R v Hasan*<sup>30</sup>**

The defendant had been charged with two counts of aggravated burglary, and relied on the defence of duress in relation to the second count at trial.<sup>31</sup> Hasan claimed that he had been coerced into carrying out the crime by a man, S, who had a reputation as a violent and murderous drug dealer. S was alleged to have made threats to both Hasan's safety and that of his family. Accompanied by a 'lunatic yardie',<sup>32</sup> S had driven Hasan to a house where the burglary was to be committed and equipped him with a knife. Hasan then forced entry into the house with the intent of breaking into a safe which was on the premises. He failed in his attempt to do so and fled, having been seen by the owner. At the trial, the judge advised the jury that the defence of duress would be unavailable to Hasan if they found that he had voluntarily put himself into a situation where he knew he was likely to be subjected to threats. This direction formed the basis of one of the grounds for appeal, and the Lords were asked to choose between three different formulations of the circumstances in which the defence of duress would be unavailable.

A second ground of appeal was the judge's ruling at first instance on the

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29 Crown Court Bench Book Specimen Directions August 2005 (49) Duress by Threats or Circumstances.

30 Above n. 2.

31 above n. 2 para 9.

32 above n. 2 para 7.

admissibility in evidence of a confidential conversation Hasan had with the police in respect of an unrelated offence. In this investigation Hasan was not a suspect and was therefore not cautioned, but the conversation was inconsistent with the evidence on which he later based his defence. The question was whether this inconsistency could be used in cross-examination under the Police and Criminal Evidence Act.<sup>33</sup> The judge ruled that it was admissible as it was not a confession. This rendered the conviction unsafe in the eyes of the Court of Appeal. The Court also found that the judge had misdirected the jury on the issue of duress. The conviction was quashed, and the Crown was given leave to appeal to the House of Lords.<sup>34</sup>

The first question related to the admissibility of the evidence under the PACE Act, which was dealt with in Lord Steyn's opinion. As it is a procedural rather than substantive question and was dealt with in a separate opinion the debate between Lord Bingham and Baroness Hale on the issue of duress can be viewed in isolation. Concentrating solely on the issue of duress allows an interesting replication of the Jake and Amy scenario, and provides an opportunity to recreate this scenario as an icon in order to examine Hale's 'difference' from the other Law Lords who agreed with Lord Bingham's judgment.<sup>35</sup>

The division between the law lords centred around whether a defendant would be entitled to rely on the defence of duress if he had, or ought reasonably to have foreseen the risk of compulsion by threats of violence,<sup>36</sup> or compulsion by threats of violence to commit criminal acts.<sup>37</sup> Neither law lord favoured an approach which would allow the defendant to rely on the defence of duress unless he had, or ought reasonably to have, foreseen compulsion by threats of unlawful violence to commit a criminal act of the same type and gravity as the offences committed, as this would be an unnecessarily broad defence.<sup>38</sup>

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33 Hereafter referred to as PACE, that is, whether it was a confession under s82, and thus could be excluded from evidence under s76 (2) and whether s78 would prohibit the prosecution from cross examining the defendant on differences between the conversation and the evidence he had given.

34 *R v Z(Hasan)* [2003] EWCA 191, [2003] 1 WLR 1489.

35 above n. 2.

36 Lord Bingham above n. 2 para 39.

37 Baroness Hale above n. 2 para 79.

38 Baroness Hale above n. 2 para 76 .

## **Section II**

### **Lord Bingham's opinion**

Lord Bingham advocated a narrow interpretation of the defence of duress. After outlining the facts of the case and the grounds for appeal he went on to consider the law of duress in detail. In his analysis he placed emphasis on three factors which he regarded as important to bear in mind when contemplating a broadening of the availability of the defence.

The first was the effect of duress in the allocation of blame. Unlike provocation, duress is a complete defence and does not attribute any blameworthy conduct to the victim. Rather, the conduct of the defendant is excused due to the criminal conduct of a third party. His Lordship considered this an important element of the defence as the moral innocence of a victim, when the perpetrator seeks to claim exoneration due to the influence another had over his actions, means that defendants who seek to raise the defence ought to face a harsher test.<sup>39</sup> His characterisation of the defence as an excuse rather than a justification for the defendant's criminal behaviour reflected this approach.<sup>40</sup> His understanding of the defence as a legal shield against penalties for departing from an imposed standard of behaviour, that of the reasonable man. The tone of his opinion indicated an approach that was unsympathetic, not only to the defendant Hasan, but to the concept of coercion in itself. His approach emphasised the expectations of the reasonable man, a coolly logical fiction with the foresight to predict and avoid the likelihood of coercion. By referring to the defence as a 'charter for terrorists'<sup>41</sup> he characterised those who would seek to rely on duress as a threat to public order and safety.<sup>42</sup>

His Lordship was also concerned with the impact of the defence on the smooth

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39 L. Toczek, 'A Case of Duress' (2005) N.L.J. 155.

40 Above n. 2 para 18.

41 Lord Bingham above n. 2 para 22 quoting Lord Glaisdale in *R v Howe* above n. 28.

42 This is a common judicial strategy, as noted by West above n. 4 especially 428-433; also R. Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative.' (1989) 87 Mich. L. Rev. 2411.

running of a trial, noting that it was relatively easy for duress to be raised and difficult for the prosecution to disprove. The subjective element to the defence, that is the requirement that the defendant's belief was genuine, should not, in his opinion, supplant the requirement that the belief also be reasonable.<sup>43</sup> He also noted that although a more restrictive interpretation of the defence may make it more difficult for defendants who had been coerced to avail themselves of its protection; it was possible for the trial judge to take such matters into account when sentencing.

Thirdly, Lord Bingham 'set the tenor of his judgment'<sup>44</sup> by expressing unease at the increasing use of the defence, and noted that it was often raised when the trial was already proceeding.<sup>45</sup> An increase in the use of the defence,<sup>46</sup> and the exonerating effect of duress for a defendant from criminal responsibility he could not (as an 'adult of sound mind')<sup>47</sup> otherwise escape were noted. These concerns moved his Lordship to adopt a restrictive policy towards the availability of the defence. The formula he favoured was that the defence of duress 'is excluded when as a result of the accused's voluntary association with others engaged in criminal activity he foresaw or ought reasonably to have foreseen the risk of being subjected to *any compulsion* by threats of violence.'<sup>48</sup> (emphasis added.)

Preferring an objective view of how foreseeable the risk was, Lord Bingham's analysis focused on the effect of broadening the availability of the defence as a matter of public policy and the working of criminal trials. Prioritising these interests over those of defendants who sought to rely on duress, Lord Bingham's judgment arguably carried the implication that the defence was being interpreted too broadly, and being relied upon 'up and down the country' by those who do not merit such protection.<sup>49</sup>

This approach applies that the rights of society and the rights of the defendant are in conflict. In his analysis, Lord Bingham adopted a rules-reliant approach that drew heavily on case-law. His judgment sought to settle the conflict of rights in a way

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43 As established in *R v Graham(Paul)*[1982] 1 WLR 294, 1 All ER 801.

44 Toczec above n. 39.

45 Above n. 2 para 20.

46 Above n. 2 para 22.

47 Above n. 2 para 17.

48 Above n. 2 para 29.

49 Above n. 2 para 1-40.



that provided a clear victor – the rights of society trumped those of the defendant. He considered that the interest society had in preventing defendants who should not be allowed to avail themselves of the defence,<sup>50</sup> from unnecessarily delaying a trial or complicating the task of the prosecution outweighed the interests of defendants who were coerced but entered into a relationship where coercion was likely.

His opinion focused on what the effects of a change in the law would be for those who practise and enforce it, rather than an examination of what the effect of the definition would be for the accused. When he examined the effects of broadening the defence on the accused he analysed it in terms of the risk it would pose to the public to allow gangs of criminals to avail themselves of duress.<sup>51</sup> In this case the rights of society, and the practical considerations of prosecution, were deemed to carry more weight.

This is unsurprising given Lord Bingham's apparent view of society as full of truly autonomous individuals. He clearly found the notion that one could be compelled to act lawfully against one's will troublesome.<sup>52</sup> This judgment and the interpretation of the defence it favours presupposes a society of independent, self governing units, who are devoid of connection. This relates to his characterisation of the defence as an 'excuse', rather than a justification of the defendant's act.<sup>53</sup> This reflects a desire to characterise the issue as being one of personal responsibility. The formulation of duress this produces, however, does not carry the theoretical foundation of duress by threats to a third party- that the responsibility one bears to oneself to obey the law and thus avoid penal sanctions- may be superseded or overwritten by the responsibilities one bears to others. Put another way, his judgment understands the priority of the self over the other, and sees interference with personal autonomy as an unqualified bad – which is arguably why he perceives coercion to be the preserve of criminal fraternities, and not the experience of the reasonable man.

Examples of coercion to perform a lawful act are plentiful, but require a sense of duty, which motivates the individual to do what they would otherwise not do. When

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50 Above n. 2 para 38.

51 Above n.2 para 22 also see D.C. Ormerod, 'Duress: Foreseeability of risk of being subjected to compulsion by threats of violence' (2006) 1 Crim. L.R. 42.

52 Above n. 2 para 37.

53 Above n. 2 para 18.

this sense of connection to another is replaced with a threat of violence (for example, the battered wife per Baroness Hale, or perhaps the use of threatening peer pressure to commit a tortious act of trespass or slander,) then examples of how one could be thus coerced to act against one's will but still act within the confines of the criminal law are easier to imagine. Lord Bingham's judgment does not admit such a possibility, perhaps because, like Jake, his view of human interaction sees a world comprised of independent actors, who would be unlikely to submit to, or even be aware of, the operation of such pressures.

Ironically this opinion uses the coercive power of the state to force people to do something lawful, to behave heroically (if they are timid or just terrified) and act lawfully when they would much prefer to submit to the threats and carry out the crime. Like Jake, Lord Bingham operates on the assumption that everyone wants to behave in the same way (that is, has the same values, an assumption Jake makes when he considers what a judge would decide in Heinz's case.)<sup>54</sup> This assumption underlies his judgment, insofar as it assumes that the individual can only be coerced by the law, or rather, the law alone has the right and power to force another to behave in a certain way. The concepts evoked by Baroness Hale's judgment, of coercion of an individual's behaviour through a sense of duty or fear are not accounted for, and yet, it is arguably a mix of a sense of duty and fear which prompts people to obey the law. Lord Bingham's opinion, then, excludes the idea of a multiplicity of laws, a web of duties and connections, which require the individual to behave in a manner other than he ordinarily would. This view of the law as supreme over all other considerations will inevitably exclude the ethic of care, or the battered housewife, who sees the duty to provide for and protect her children as her primary concern.

It is possible, as illustrated above, to argue that Lord Bingham approached the case of *Hasan* in much the same way as Jake approached Heinz's dilemma. Reasoning in terms of values and rights, he applies abstract rules to the scenario, supposing a background social order composed of autonomous individuals who fully exercise their free will within the confines of the law. Within this framework he weighs society's right not to have to bear the burden of 'bad choices' made by an individual in choosing his associates, against a defendant's right not to be punished for an action he did not

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54 Above n. 1 at 28.

perform freely. In his calculation of these rights, he finds the availability of the defence must be narrowed to avoid greater social harm. In this instance, the needs of the many outweigh the needs of the one. This is comparable with the hierarchical logic of Jake's ladder, that one is worth more than, and thus 'trumps' the other.

### **Section III**

#### **Baroness Hale's opinion**

Baroness Hale delivered a separate opinion which 'adopted a more generous interpretation of the defence.'<sup>55</sup> Despite this, she accepted both Lord Steyn's interpretation of the PACE regulations<sup>56</sup> and the opinion of the House<sup>57</sup> that the Crown's appeal should be allowed on both counts. Where she differed from Lord Bingham was in her interpretation of the defence of duress. She advocated a broader availability of the defence. This would allow a defendant to raise the defence of duress unless he 'foresaw (or should have foreseen) the risk of compulsion by threats of violence to commit criminal offences.'<sup>58</sup>

Like Lord Bingham, Baroness Hale set the tone of her judgment in the first paragraph, in which she committed herself to a subjective approach. By stating 'My Lords, in 1993 I set my name to the Law Commission's report on duress'<sup>59</sup> she identified this as the main influence on her thinking. Although her concerns appear to revolve around victims of domestic violence, this is a somewhat limited interpretation of her views. She favoured a broader version of the defence because she recognised the possible injustice the majority view would do to those who 'have a quite different reason for becoming associated with the duressor and then find(s) it difficult to escape.'<sup>60</sup>

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55 D.C. Ormerod above n. 51.

56 Above n. 2 para 79.

57 Above n. 2 para 79.

58 Not, however, criminal offences of the same type or gravity as were in fact committed, agreeing with the House that this would make the defence too broadly available., above n. 2.

59 Above n. 2 para 71.

60 Above n. 2 para 78.

She favoured 'a more subjectivist'<sup>61</sup> version of the defence because it clearly had room for such individuals, but did not amount to the 'terrorist's charter' feared by Lord Bingham. The defence of duress should not, she agreed, be available to those who voluntarily associate themselves with criminal networks for the implied purpose of gain. As her opinion makes clear however, there are several ways in which one can become associated with a criminal network, and what may appear voluntary behaviour to a neutral observer or ordinary man, may be experienced as anything but voluntary by the individual defendant. Her example of the battered wife is, as argued below, deployed strategically, but other examples come to mind, such as a social grouping which eventually becomes a gang, or perhaps the structural pressures of so called "crime families" which may be exerted on the young and dependent.

Their Lordships disagreed over the reception a more subjective construction of the defence of duress could expect to receive. Lord Bingham had claimed that prosecutors would find the defence more difficult to disprove,<sup>62</sup> whereas Baroness Hale argued that the consultation the Law Commission had taken had not shown any hostility to a more subjective interpretation of the defence among practitioners, given the reversal of the burden of proof the Commission recommended.<sup>63</sup> She argued that the defence was unpopular amongst practitioners because it was raised more frequently as the use of DNA evidence had increased, and arguably by those who did not merit the protection it provided, and stated her desire for the legislative change a reversal of the burden of proof in the defence would require.<sup>64</sup>

Without legislation, however, this course of action was not open to the House. In the absence of such a change, Baroness Hale preferred a formulation of duress which did not exclude those who could not be expected to resist threats but did not fall within the traditional scope of the defence. Her analysis included those who are in a relationship with the duressor, who do not act as the free and autonomous individuals imagined by the law. In this case, her example was the battered wife, whom she constructed in terms of her relationship to her abuser and the duties she owed to her

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61 D.C. Ormerod above n.51.

62 Above n. 2 para 20.

63 Law Commission, 'Legislating the Criminal Code, Offences Against the Person and General Principles' (Law Com 218; Cm 2370, 1993).

64 Above n. 2 para 74.

children.<sup>65</sup> Such a person, Hale argued, would be excluded from the defence of duress (as formulated by Lord Bingham) on the basis that she ought reasonably to have foreseen compulsion to commit any act, but;

That should not deprive her of the defence of duress if she is obliged by the same threats to herself or her children to commit perjury or shoplift for food.<sup>66</sup>

Baroness Hale's opinion invites discussion of public understanding of duress, voluntarism, independence, and a review of the use of the term 'reasonable' in law. What is reasonable behaviour to a fit and healthy individual may be heroic behaviour to another. The ordinary man and the ordinary grandmother have different versions of what it is reasonable to expect them to do. This is recognised in the defence with the recognition of the 'characteristics of the defendant', however, Baroness Hale exposes the logical fallacy in only considering certain types of criteria to be operative. The image of the battered wife she employs emphasises the narrowness of an approach based upon a limited set of characteristics. The subjective analysis she favours places the judge into the shoes of the defendant, and requires him or her to ask what forces were actually operative on the defendant, what pressures decided his conduct, and then to determine the availability of duress.

The objective approach, by contrast, asks what forces *appear* to be acting on the defendant, and whether the defendant *appears* to be reasonably able to resist those forces. Hale employs the stereotypical images of the battered wife and the weak and fearful grandmother to illuminate this flaw in the current law and to advocate a reconsideration of social expectations of conduct. In doing so, she places the opinions of the other Law Lords in a simpler, broader context that makes their reasoning look over complex and their approach unduly narrow.

Ultimately, Hale agreed that the Crown's appeal should be allowed,<sup>67</sup> but used the opportunity to emphasise the fact that the battered wife has the same reasonable excuse as the police infiltrator. Her articulation of the different experience of duress

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65 Above n. 2 paras 77 and 78.

66 Above n. 2 para 77.

67 Above n. 2 para 78.

serves the same function as Gilligan's articulation of '*A Different Voice*.' Just as Jake's 'detached logic gives the message that other experiences and mental processes are irrelevant and invalid.'<sup>68</sup> Amy's construction of the dilemma validates the experiences of those whose experiences are not represented in the black letter of the law.<sup>69</sup> Like Amy in the Heinz dilemma, Baroness Hale could be said to have imagined a world of interconnected and interdependent individuals. In her consideration of the case she escaped the confines of the facts and examined the wider context. This included the potential impact of a narrower defence on those whom it would exclude.<sup>70</sup>

Her opinion also shows certain features which Spiegelmann argues are typical of 'Amy's web'.<sup>71</sup> Rather than seeking to establish winners and losers in a conflict of rights, Baroness Hale sought to communicate ideas about the meaning of duress, and explore concepts of voluntary and involuntary behaviour. Her use of the image of the battered woman similarly reflects a view of individuals as constituted by the various relationships he or she has. Like Amy does, she seeks a resolution that will not criminalise behaviour which was motivated by a moral, or caring, sense of duty to another. Amy resists the breaking of connection, whereas Jake differentiates between positive (legitimate) connection and negative (illegitimate) connection. Amy is open to the possibility that someone may have a negative connection for positive reasons, and Jake thinks that everyone thinks in his way, as his assumption that the judge would not punish Heinz suggests. Amy's answer 'It depends' is at the heart of Baroness Hale's judgment – she seeks to convey the possibility that there are different reasons for entering into a relationship in the same way as Amy suggests there are different ways of getting the drug from the pharmacist.

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68 P. Spiegelmann, 'Integrating Doctrine, Theory and Practice in the Law School Curriculum: the Logic of Jake's Ladder in the context of Amy's Web.' (1988) 38 J. Leg. Ed. 243, 250.

69 The phrase, 'black letter of the law' is here used interchangeably with what Reznik calls the 'canon' - traditional legal issues, or core subjects, interpreted in a conventional manner. See J. Reznik and C. Heilbrun, 'Convergences, Law, Feminism and Literature' (1999) 99 Yale L.J. 1913.

70 In arguing that the battered wife may have the same reasonable excuse as the police infiltrator, Baroness Hale allows for the consideration of those previously unconsidered in law. The 'reasonable excuse' was included in the defence to protect the police infiltrator, but the pressures operating on the domestic abuse victim were not considered, her 'story' was not told in the law.

71 Spiegelmann above n. 68.

**Section IV**  
**The Source of the Difference.**

The two opinions discussed previously represent two radically different judicial approaches. Lord Bingham can arguably be said to adopt the logical approach Jake is seen to employ in the Heinz dilemma. His judgment was based on existing law and practical concerns, his emphasis being on the rights of society to be protected from those who would seek to use their own behaviour as an excuse to avoid criminal liability against the right of an individual not to be blamed for a crime he was forced to commit. He seeks to perpetuate the system of rules in which he operates. He advocates fairness through objectivity. Both from a pragmatic and a moral perspective he argues that the same standards of behaviour should be imposed in society to prevent unfairness or manipulation of the system by those whom it is not designed to protect. The role of the judge, in Lord Bingham's eyes, is to assess the evidence presented by the parties neutrally, and decide based on what is fair, just and reasonable in a democratic society. His values are thus rights and justice, he relies on rules and procedure to achieve these rights, and his method of dispute resolution is adjudication. In Spiegelmann's description of the logic of Jake's ladder, Lord Bingham is unquestionably operating along the ethic of rights.

Baroness Hale's opinion, as has already been noted, is far more contextual and subjective in its analysis. Did she approach the problem as Amy did, fighting the hypothetical, emphasising context, and viewing the world as a web of inter-connected, interdependent actors? Her method was distinguishable from Lord Bingham's because she did not only seek to arrive at the truth of the law, she sought to communicate ideas about the defence of duress and its associated criteria. Hale also sought to communicate ideals about what the law could be rather than simply declare what the law was. In this analysis, her judgment could be read as a transcription of Amy's web, a view of the world in which all are connected, all are responsible, including those who create and apply the law. In her view of adjudication, the judicial responsibility is not merely to hear impartially and neutrally, not solely to decide fairly. In order to perform this most basic of judicial roles, the judge must also understand the circumstances surrounding the individual case and the individual him or herself. Put another way,

where 'Jake' would judge based on an evaluation of the rights of society and the individual, 'Amy' would make a judgment based on the individual, their circumstances, and what society could fairly be said to expect of them. In both Gilligan's research and in this example, the two different approaches resulted in the same decision, with subtle but significant differences. In this analysis then, it appears that both Lord Bingham and Baroness Hale are conforming to their expected behaviour as Jake and Amy.

Although these analogies can be drawn between the way Jake and Amy are described as reasoning and the different approaches of Lord Bingham and Baroness Hale respectively, such an analysis is simply one way of exploring the opinions, and their possible interpretations. Gilligan's research warns against the danger of hearing only one story, and advocates a multidimensional approach to problem solving.<sup>72</sup> Secondly, the research subjects in question were at the conventional stage of moral development,<sup>73</sup> as opposed to having fully realised their potential for moral reasoning. The use of Gilligan's research and Spiegelmann's expansion upon it was intended to highlight the differences between the two opinions, but not to define them as distinctly male or female, or employing the ethics of justice and care, but rather to use this model to express Hale's difference.

Baroness Hale may be the first woman appointee to the House of Lords but she is also the first academic to take up the post. Her route to the Lords was 'just a bit different'<sup>74</sup> and arguably it is this difference that makes the difference. Lord Bingham and Baroness Hale approached the case from two different professional backgrounds and thus with two divergent sets of values in mind. Lord Bingham's approach does not consider the context of the battered wife, or, put another way, those individuals who, through no fault of their own, cannot be said to act autonomously. It gives greater weight to the needs of practitioners for the law to be clear and certain. In doing so, it denies space for considerations of those the law ignores or does not directly address, and what characteristics the law assumes an individual has and what characteristics the individual really has. In short, Lord Bingham's opinion suggests that his primary concern is the efficiency of the legal system and clarity of the law to achieve fairness.

<sup>72</sup> See Gilligan above n. 1 and Spiegelmann above n. 68.

<sup>73</sup> Whereas Kohlberg identified six stages of moral development see Gilligan above n. 2, 18.

<sup>74</sup> E. Rackley, 'Difference in the House of Lords' 15 S.&L.S. 163, 175.



This is in keeping with his professional background. Lord Bingham, in arguing a different context to Baroness Hale, focuses on the task of administering and enforcing the law as it stands, and how best to do that. It seems much more likely that this is as a result of his experiences as a practising barrister and lengthy judicial career,<sup>75</sup> and his administrative responsibilities during his judicial career.<sup>76</sup> These concerns are those raised most frequently in his judgment, and it seems uncontroversial to argue that this is the framework of principle to which he refers.<sup>77</sup> His professional experience gives rise to his preference for a less broadly available defence. Similarly, Baroness Hale states clearly that the principal influence on her thought is the Law Commission report which she co authored in the early 1990's.<sup>78</sup> Indeed, it is her experience of reforming and commentating upon the law which arguably gives her a unique insight into it, and a unique way of discussing and explaining it.

Lord Bingham's argumentative judgment seeks to defend his views with reliance on precedent, or prove his case as a barrister of his calibre would naturally do. Baroness Hale, by contrast, adopts a more discursive tone, akin to that she uses when writing extra-judicially.<sup>79</sup> Having discussed elsewhere the impact of the ritualised and impenetrable nature of the court proceedings in family law,<sup>81</sup> Hale speaks clearly and concisely, allowing for justice to be understood as well as to be done. In much the same way, she avoids the criticisms she has made of her colleagues for appearing divorced from reality<sup>82</sup> by showing a profound awareness of the social context in which she operates. This, too, seems to stem from her background rather than her femininity, a result of years of practice in family law and research into the impact changes in the law would produce at the Law Commission. In this sense, Hale has her own framework of principle, an approach that emphasises the need for law to reflect the experiences of society. Not only should the law be clear and certain, but in her view, it should be

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<sup>75</sup> See [www.tombingham.com/cv.php](http://www.tombingham.com/cv.php) last accessed 18th March 2008.

<sup>76</sup> See above n. 75.

<sup>77</sup> See above n. 2 especially 20-23.

<sup>78</sup> Law Commission Report 218 above n. 59.

<sup>79</sup> See for example B. Hale, 'The Value of Life and the cost of Living- Damages for Wrongful Birth' Staple Inn Reading 2001 available online at [www.actuaries.org.uk/\\_data/assets/pdf\\_file/0005/19850/staple\\_inn\\_read\\_2001.pdf](http://www.actuaries.org.uk/_data/assets/pdf_file/0005/19850/staple_inn_read_2001.pdf) last accessed 26<sup>th</sup> July 2008; B. Hale, 'Equality and the Judiciary: Why should we want more women judges?' [2001] P.L. 489.

<sup>81</sup> B. Hogget, 'Family Courts and Family Law Reform - Which Should Come First?' (1986) 6 Leg. Stud. 1.

<sup>82</sup> Hale 'Equality and the Judiciary: Why should we want more women judges?' above n. 79.

flexible enough to accommodate those who are most vulnerable.

### **So what Difference did Difference make?**

A system of thought is incomplete if it ignores our need for individuality or our need for community, emphasises competition to the exclusion of cooperation or cooperation without including competition, or abstracts without examining context, or deals only in context without a perspective that transcends context.<sup>83</sup>

The opinion Hale delivered in *Hasan* had no more concrete effect other than raising the possibility of special consideration being given to victims of domestic violence who commit offences under duress.<sup>84</sup> The limited practical impact of Baroness Hale's opinion on the law, (which still awaits Parliamentary review), or on the outcome of the case for Hasan, should not obfuscate the importance of the nature of her dissent as to the scope of the definition of duress. As Gilligan argues 'The inclusion of two voices in moral discourse, in thinking about conflicts, and in making choices, transforms the discourse. It is no longer either simply about justice or simply about caring, it is about bringing them together to transform the domain.'<sup>85</sup> The importance of Baroness Hale's opinion does not lie in its impact (or lack thereof) on academic commentary<sup>86</sup> or the structure of the defence of duress, but in the fact that a different perspective was brought to the law, with its own focus of concern and a separate agenda. A focus on the story of the individual thus complements a mathematical evaluation of their rights. This is ultimately beneficial, as West describes 'a regime of rights that is unsupported and uncomplemented by narrative ... gives rise to an excessively legalistic and alienating community.'<sup>87</sup>

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83 Spiegelmann above n. 68, 251.

84 Toczek above n. 39.

85 Gilligan above n. 1.

86 See, for example, Ormerod above n. 51 which paid scant attention to Baroness Hale's opinion.

87 West above n. 4 at 26.

**Section V**  
**Re-reading the narrative**

Baroness Hale argued that:-

Perhaps because *I* am a reasonable but comparatively weak and fearful grandmother, *I* do not understand why the defendant's *beliefs and personal characteristics are not morally relevant to whether she could reasonably have been expected to resist*. No doubt unduly<sup>88</sup> influenced by Professors John Smith, Edward Griew and Ian Dennis, therefore, I remain attracted by the Law Commission's proposals.<sup>89</sup>

This paragraph is indicative of her strategic use of the image of a needy female, but it seems too obvious an attempt to evoke the chivalry of the law. Rather, it could be read as a complex attack on the traditional images of women which serve to exclude or diminish their interests. The argument could perhaps be re-interpreted as inquiring whether, if these images have a grounding in fact, why the legislation has not been interpreted or written to account for such eventualities as the weak and fearful grandmother, or the battered wife? In short, why does the law operate to exclude such experiences of duress? Her attack thus focuses on the morality of excluding the perception of those who are weakest – that is to say she attacks the construction of the defence as it relates to the reasonable man when the individual who might be most morally worthy of the defence cannot legally avail himself of it.

Similarly, her use of the image of the battered wife seems to call into question the legitimacy of the court's rule in a case they, as Lord Bingham admits, cannot

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<sup>88</sup> The description of influence as 'undue' acknowledges the implications of the image of the Herculean judge as discussed in chapter one and two, but her decision to cite these authorities regardless reflects a perspective of the judicial role which is more akin to that discussed in Chapter 4.

<sup>89</sup> Hale above n. 2 at para 73, emphasis added.

understand or conceive of.<sup>90</sup> Baroness Hale's opinion has been interpreted<sup>91</sup> as defending the interests of the battered wife, however, the expression of different forms of duress carries with it the admission that the House of Lords should not rely only on precedent in establishing what is and what is not duress. This places a responsibility on the judge to be able to subjectively interpret the experiences of the defendant as well as have the ability to objectively interpret the requirements of the law. Her argument allowed for the possibility of alternative experiences of duress which are not currently reflected in the law, but which may still operate on the defendant to the same effect—that is to subvert their will. Therefore her decision explores the relevance of the use of the 'reasonable man' model, in a situation where the behaviour of the defendant seems wholly irrational, if rational behaviour is modelled on the self-interested, autonomous individual, where does that leave those who are not as self-interested or who act out of duty to their partner or children? The use of stereotypes of women, both as the grandmother and the good mother, highlights the position of the 'other'.

Yet her decision would have had as much impact on the running of the courts as Lord Bingham's. If the Law Lords had not precluded the formulation of the defence that Baroness Hale preferred, it is possible that the number of female offenders 'reduced to shoplift for food'<sup>92</sup> would have had a defence which they could rely on in court. This would reduce the number of female offenders going to prison for minor crimes such as shoplifting, with all the social harms and costs incurred.<sup>93</sup> Such harms include the possibility of children remaining in the care of an abusive father or perhaps abandoned completely whilst the mother is in prison. Social costs are more economic, such as the burden on society of providing the woman with prison accommodation, perhaps a lengthy trial and appeal process, as well as the extra administrative and maintenance costs which might be incurred when she leaves prison and perhaps cannot find a job because she has a criminal record, and so becomes dependent on benefits. So

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90 Above n. 2 at para 37 Lord Bingham states 'there need not be foresight of coercion to commit crimes, although it is not easy to envisage circumstances in which a party might be coerced to act lawfully'.

91 Toczek above n. 39.

92 The last official research from HM Prison Service demonstrated that as of 2003 more than 50% of women in custody had committed offences of theft and handling, (2,599) and less than 25% (847) of the total population were in prison for drug offences, more than 56% of sentenced women could be diagnosed as having a mental illness and women account for over 25% of self harm incidents per year, despite the fact that they only account for 6% of the prison population. HM Prison Service; Women's Estate Policy Unit Bernice Ash ed. 'Working with women prisoners' 4<sup>th</sup> ed Nov. 2003.

93 Around 55% of all women in prison have a child under 16, more than 33% have a child under 5 above n. 92.

by considering the position of the 'other' in the micro-society of the family, Baroness Hale also affords the reader some insight into the trap such women find themselves in, and the harms to society which could be avoided by including the reasonable battered wife in the defence.<sup>94</sup>

A further point worthy of note is the accessibility of her opinion, which is written in a clear and direct style. Her narrative does not exclude the possibility of a layman understanding her reasoning through obfuscatory language. Rather, she employs simple language and accessible imagery to raise the concerns of those who find themselves in difficult and abusive situations from which they find it almost impossible to extricate themselves.

This differs from Lord Bingham's approach, but adds force to her subtle critique of the use of the reasonable man as the dominant model in adjudication. Like Jake, Lord Bingham operates on the assumption that everyone wants to behave in the same way (that is, has the same values, as assumption Jake makes when he considers what a judge would decide in Heinz's case.)<sup>95</sup> Neither Jake nor Lord Bingham, however, can explain or accommodate the phenomenon of the battered woman. Rather, the law must expand the symbol of the reasonable man, manipulating its original meaning, in order to account for the experiences of the 'Other'.<sup>96</sup> In clinging to this symbol, however, it merely tolerates and does not fully accommodate the battered wife, or other individuals who are outsiders in the law. As argued in the previous chapters, it is the mythic power of such symbols, the idea of the reasonable man and the infatuation with the Herculean image of the judge, which operate to exclude and ignore the experience of the Other in adjudication.

Both the tone and the substance of Baroness Hale's opinion serve to highlight the flaws in that of Lord Bingham. The different experiences of the two Law Lords provide for two opinions that diverge on an important legal issue. The inclusion of

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94 For a more complete analysis of Baroness Hale's views on women in the penal system see 'The sinners and the sinned against, Women in the Criminal Justice System' Longford Lecture delivered to the Fawcett Society available online at <http://fawcettsociety.org.uk/documents/longford%20lecture.pdf> last accessed 17th March 2008.

95 Gilligan above n. 1, 28.

96 As Donovan argues 'the reasonable man's claims to universality are under siege' K. Donovan, 'Law's Knowledge: the judge, the expert, the battered woman, her syndrome.' (1993) 20 J. of Law and Soc'y 427, 429.

Hale's analysis is important because it allows for a more complete consideration of the defence, voicing as it does the concerns of those who are subject to the law as well as those who practice it. By hearing and retelling the story of the battered wife, or those in an analogous situation, she addresses some of the law's inefficiencies and inequalities, producing a multi-layered opinion which was worthy of a greater academic response and should have sparked wider public and jurisprudential debate, but sadly, did not.

The benefits of an academic lawyer in the House of Lords are evident in the case examined in this chapter. This chapter does not seek to argue that Hale's difference has made a difference in terms of the impact her decisions have had, or through her presence on the bench disrupting the aesthetic of a pale male judiciary, although these points can be made.<sup>97</sup> The purpose of this chapter is to show that Hale's method of thinking about the issues in the case differs from the other law lords, leading to subtly different conclusions. Further, it attempts to illustrate that this difference is not a result of her gender but a consequence of her different route to the bench.

By exploring the meaning of words and concepts, like duress, autonomy,<sup>98</sup> or parent,<sup>99</sup> her method of analysis requires the reader to reconsider how such concepts are defined, and what the impact of the definition is. In this way, she is just a bit different, inviting an analysis of what is meant when we say different. Through emphasising the importance of decoding the meaning behind commonly used words which describe social roles, or prescribe behaviour, Hale challenges the reasonable man's method of explaining such ideas. Rather than having one explanation of what it means to be autonomous,<sup>100</sup> or the meaning of parenthood,<sup>101</sup> she considers the subjective experience of the individual who takes on the role of the parent, the autonomous actor, or the victim of a coercive, abusive relationship. Her inclusion of

97 Hale above n. 79, 501 'If someone has a research student looking for something to research, one of these days it might be possible to examine my own small contribution to the law....Have my small offerings on the Bench been affected more by (a) my gender, (b) my academic career (c) my reforming tendencies and experience, or (d) my tendency to go native'.

98 See for example her judgement in *R (on the application of Begum) v Denbigh High School Governor* [2006] UKHL 15, (2007) 1 AC 100.

99 *In re G (Children) (residence; same sex partner)* [2006] UKHL 43, (2006) 1 WLR 2305.

100 In *Begum* (above n. 98) she distinguished between freedom to make a choice and capacity to understand the implications of the choice you have made, comprehending that children, teenagers and adults have different levels of intellectual freedom, as their knowledge and independence increases over time.

101 In *Re G* above n. 99 Hale discussed three possible ways of being a parent, and ascribed value to all three, whereas the other law lords simply observed that "mothers are special", which does not fully explore the meaning behind the term mother.

the Other presents the case from the perspective of those who are victimised, without excluding the experiences of those who are not.

As argued above, this approach cannot be simply a product of biological and social factors, although these may have their influences, and the extent to which gender affects the reasoning processes of the individual cannot be easily determined. A recent study conducted at the University of Kent suggests that there may indeed be gender differences in co-operative activity, with female leaders tending to display more altruistic behaviour than male.<sup>102</sup> Yet Hale has frequently commented on the likely source of her difference, and the influences on her thinking, and she attributes little to her gender. She does not claim that gender is irrelevant, merely that it is one factor amidst several others that could influence her thinking.<sup>103</sup>

When discussing her decision in *Parkinson v St James and Seacroft University Hospital NHS Trust*<sup>104</sup> Hale considered the possibility that her gender might have influenced her thinking. She admitted it to this extent 'The one thing which inevitably distinguishes women from men is the experience of conception, pregnancy and childbirth.'<sup>105</sup> was careful to draw the distinction between a different experience and a difference in nature. Her argument was not that the need for more women on the bench was based on some internal morality, but rather that her judgment in *Parkinson* was an improvement on previous decisions because she understood, from a personal perspective, the realities of pregnancy and childbirth. Through her experience, she was able to realistically assess the damages that arise from a wrongful birth. Thus she had no difficulty with the idea that a child may not be the unmixed blessing, the reason for joy and celebration, and was not squeamish about viewing this as a financial cost, and compensating the mother for the 'physical and psychological consequences,'<sup>106</sup> loss and 'curtailment of personal autonomy'<sup>107</sup> she had suffered, as well as the duty to look after a disabled, and difficult child.

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102M. Van Vugt, D. De Cremer, D.P. Janssen, 'Gender differences in Cooperation and competition; the Male Warrior Hypothesis.' (2007) 18 *Psychological Science* 19.

103 Hale above n. 82 and 97.

104 [2001] EWCA Civ 530, (2001) 3 W.L.R. 376.

105 B. Hale, 'The value of life and the cost of living – damages for wrongful birth' Staple Inn reading 2001, [www.actuaries.org.uk/\\_data/assets/pdf\\_file/0005/19850/staple\\_inn\\_read\\_2001.pdf](http://www.actuaries.org.uk/_data/assets/pdf_file/0005/19850/staple_inn_read_2001.pdf)- last accessed 26<sup>th</sup> July 2008.

106 above n. 104 para 66.

107 above n. 104.

### Conclusion

A diversity of ability, as Hale's jurisprudential method suggests, results in a different approach to law. This challenge to the traditional method of legal reasoning benefits both modes of thought, and acts to prevent the values and concerns of one becoming dominant. In *Hasan* the adoption of narrative as a way of including the experiences of the other is merely indicative of a broader approach that seeks to challenge conventional wisdom about the meaning of common sense, reasonable, autonomous and duress. In exploring the meaning behind Hale's opinion we gain greater insight into the process by which she explores the meaning of the law. In doing so, by harnessing, and appreciating, the didactic power of story, we gain valuable insights. Put another way, simply by engaging with and hearing the stories told by the different/deviant/other, we gain a richer understanding. Through the multiplicity of narratives, a more complete and complex image emerges.

As Baroness Hale argued, quoting Benjamin Cardozo;

The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component levels.<sup>108</sup>

Therefore, one argument for diversity of thought, that is, diversity of background and experience on the Supreme Court is that it will prevent the dominance of one particular mode of thought and thus the dominance of one set of values. A diversity of thought, as Hale's jurisprudence suggests, results in a different approach, and the 'efforts made to ensure an appropriate balance of expertise in the Court of Appeal'<sup>109</sup> should and could be replicated for the benefit of the new Supreme Court.

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<sup>108</sup> B. Cardozo, 'The Nature of the Judicial Process' Yale University Press 1961 p 177; quoted in B.

Hale, 'Making a difference, Why we need a more Diverse Judiciary' (2004) 56 N.I.L.Q. 281, 292.

<sup>109</sup> Hale above n. 108.



This would create the opportunity for a novel discussion of legal issues, and in doing so prevents the exclusion of other sets of values as discussed above. These values represent the backgrounds and experiences of those who hold them, and thus, by including them in legal discourse, no longer can it be said that 'Jake's' 'detached logic sends out the message that other concerns and experiences are irrelevant.'<sup>110</sup>

Another, more utilitarian argument derives its strength from the effect of Hale's expertise in the issues which arise in the cases examined above. Her judgments reveal an acute understanding of the implications her decisions and those of the other Law Lords have on society, the legal system and the individuals in the case. The knowledge gained from her work at the Law Commission and her experiences in the family court make it unsurprising that she speaks with such authority and insight, especially into the ways in which battered women may turn to shoplifting, alcoholism, or other forms of (self) destructive behaviour to protect themselves from their abusers, and then be subject to the rigours of the law for a crime produced by circumstances that they admittedly chose but could not have foreseen the outcome. The House of Lords thus benefits from her presence in two ways, a challenge to the standard methods of reasoning, and a wealth of experience from which to draw. So diversity on the bench should not merely be encouraged in terms of gender or ethnicity, but it must also be noted that the judiciary will be 'poorer, in terms of appreciating what is at stake and the impact of its judgments, if all its members are cast in the same mould.'<sup>111</sup>

Yet the proposals discussed in chapter two will not produce this desirable mix of minds. The structure and substance of the selection criteria reflect a continued infatuation with the ideal of a Herculean judge, which requires that he or she set aside previous experience and listen to each case with a neutral yet somehow all knowing mind. Baroness Hale refuses to engage in such a charade, her judgments clearly acknowledge the influences on her thinking.<sup>112</sup> Her academic writings and her judgments are comparable.<sup>113</sup> This open admission of prior knowledge and informed decision making is desirable because it challenges the idea that the only way to judge

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<sup>110</sup> Spiegelmann above n. 68, 255.

<sup>111</sup> Hale above n. 74, 504.

<sup>112</sup> As in *R v Hasan* when she openly defends the Law Commission's formulation of duress, above n2 or in *Re G* where she places emphasis on the importance of the use of family assistance orders to aid in resolving disputes above n. 99 para 45.

<sup>113</sup> B. Hale, 'The Quest For Equal Treatment' [2005] P. L. 571.

fairly is to judge blindly, and without awareness of the social context. It challenges the Herculean image of the judge as removed from day to day life, some heroic figure who must struggle to put aside his personal knowledge and experience. It allows for the hope that a judge will be able to make informed decisions.

This view was echoed by Mrs Justice Dobbs writing in the legal section of *The Times*<sup>114</sup> when she argued that 'Diversity is not defined simply by the colour of a person's skin, gender, religious beliefs etc. It is much broader and much more complex. It is about the breadth and depth of a person's experiences and what he or she can bring to the role of being a judge.'

The desire for such a range of expertise reflects an increased willingness to surrender the Herculean ideal of the judge, and the divine concepts of right and wrong he is so willing to decide between. It allows that the role of a judge demands more of an individual than the 'correct' interpretation of black letter law, that is the simple application of pre existing rules to easily defined scenarios. In short, by admitting that one judge, no matter how seasoned a lawyer or erudite an academic, can possibly have all the right answers, we allow the possibility that a group of seasoned lawyers and erudite academics may, at least, be able to provide some of them. This chapter is intended to stand as an example, as well as an illustration, of the possibilities of diversity of thought, that the reform of the judicial appointments system should be geared to achieve.

This chapter discussed the effect of Hale's jurisprudence and ability to accommodate the experience of the Other as an important aspect of her difference. Arguing that the difference Hale's difference made could be more easily ascribed to her academic background and expertise than her gender, this chapter examined Hale's difference as a specific example of the potential of diversity of thought.

In the next chapter this thesis will go on to examine the potential of a different conception of the judicial role. It discusses the influence of the HRA 1998 and dialogic theory on understandings of the judge, and argues that the Herculean ideal which

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<sup>114</sup> Dobbs J. 'A Place on the Bench? Its time to step forward.' *The Times* 24<sup>th</sup> April 2007, writing prior to the Minority Lawyer's Conference April 2007.

defines judicial merit is no longer an accurate description of the role of the judge. It suggests that the potential of diversity of thought and dialogic theory allows for a new image of the judge, and employs the image of Loki<sup>115</sup> from Norse mythology as an attempt to represent this new judicial role.

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<sup>115</sup> Loki was a famous figure in Norse mythology, see *The Poetic Edda*. Edition quoted in this thesis S. Sigfusson and S. Sturleson, 'The Elder Eddas of Saemund Sigfusson; and the Younger Eddas of Snorre Sturleson' available from [www.gutenberg.org](http://www.gutenberg.org) at <<http://www.gutenberg.org/files/14726/14726-8.txt>> last visited 23<sup>rd</sup> March 2008

## **Chapter Four**

### **Re thinking the Superhero Judge and Re- Imagining Judicial Diversity**

This thesis has argued that a focus on making the bench more representative of society in terms of ethnicity and gender is welcome, but should be an ancillary concern to achieving a judiciary which is better balanced in its understanding of the law, and in its approach to the social and cultural effects of the law. Put another way, this thesis argues that to continue to appoint a judiciary of highly trained lawyers,<sup>1</sup> be they barristers or solicitors of whatever background, neglects diversity of thought at the expense of diversity of form.<sup>2</sup>

Further, it provides the Herculean ideal with legitimacy, by implying that this idealised conception of the judge is necessary and sufficient. The Judicial Appointments Commission's (hereafter JAC) definition perpetuates the fiction that the best possible type of judge is the detached, rational adjudicator, and denies the fact that few judges could ever achieve this level of 'superhuman skill, learning and acumen'.<sup>3</sup> This thesis suggests that a continued infatuation with the Herculean ideal of the judge has shaped attempts at judicial reform, allowing those who would seek to change the judiciary to engage in their own game of denial,<sup>4</sup> believing that they are seeking to make the judiciary more representative, whilst simultaneously believing that the Herculean ideal as a definition of merit is the best safeguard of public confidence.<sup>5</sup>

As the previous chapter demonstrated through an exploration of Baroness Hale's

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1 See Constitutional Reform Act 2005 s64 which emphasises the principle of merit (hereafter CRA 2005).

2 See above Chapter Two.

3 R. Dworkin, *Law's Empire* (Hart Publishing, Oxford 1998) 265 Dworkin openly acknowledged the mythic nature of Hercules.

4 D. Kennedy, *A critique of adjudication; fin de siecle*. (Harvard University Press, Cambridge, Mass. 1997) this may be attributed to the phenomenon of coercive consensus, that is, the beliefs or denial of the majority are subconsciously expressed in the actions of the elite.

5 B. Hale, 'Equality and the Judiciary: Why should we want more women judges?' [2001] P.L. 489, 493 criticising the assumption that 'we have any full or coherent concept of what constitutes "merit" for judicial appointment' and observing that 'it is interesting how the word "merit" only emerges when the appointment of women and other non-standard candidates are being discussed'.

jurisprudence,<sup>6</sup> a judge with a deeper understanding of the circumstances of the individual can provide for the accommodation of the Other in law without upsetting the judicial product, and indeed, subtly improving it. So the suggestion is not to de-mythologise the law,<sup>7</sup> but rather, re-mythologise it to accommodate the politicisation of the judicial role and allow the law to be flexible enough to accommodate multiple needs.<sup>8</sup> As the judicial role changes in tandem with the composition, values and political structure of the society in which the judges operate, it becomes increasingly urgent to determine the new judicial role in order to establish what is now expected of the judge. In the case of the House of Lords, or the Supreme Court as it will be, the Law Lords, more so than other appellate jurisdictions, find themselves operating in a 'significant period of constitutional reform.'<sup>9</sup> The effect of this reform is to blur the boundaries between law and politics.<sup>10</sup> The Human Rights Act 1998 (hereafter HRA 1998) has prompted much academic speculation on the new role of the judge.<sup>11</sup> Thus, it becomes important to examine the new role of the judge in order to decide what definition of merit best suits the revamped judicial role.

Section I of this chapter discusses changes in the judicial role which have developed as a result of the HRA 1998<sup>12</sup> It is argued in this section that the judicial role has developed since the passage of the HRA 1998, and that the actions of the judiciary can no longer be simply understood as an elite and controlled discussion. Rather, is is a 'contestable, value laden exercise'<sup>13</sup> in which the judiciary are involved in scrutiny of the actions of the government, being drawn into the arena of politics. Section I discusses the potential of the new judicial role, and argues that the areas in which the HRA 1998 involves the judiciary inevitably draws on their moral, political and social knowledge.

Section II discusses dialogic theory, the idea that judges and the legislature are engaged in a dialogue about the content or moral, social and legal principles. This

6 See above Chapter Three discussion of *Hasan* Section III.

7 See above Chapter 2 Section III and IV.

8 S. Williams, 'The uses of myth, a response to Professor Basset.' (1986) 4 J.L. & Relig. 153.

9 T. Hickman, 'The Courts and Politics after the Human Rights Act' [2008] P.L. 84, 84.

10 D. Nicol, 'Law and Politics After the Human Rights Act.' [2006] P.L. 722, 743-744.

11 See for example D. Bonner, H. Fenwick and S. Harris-Short, 'Judicial Approaches to the Human Rights Act.' (2003) 52 I.C.L.Q. 549; Hickman above n. 9; Nicol above n. 10; I. Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg.' [2002] P.L. 265.

12 Above n. 11.

13 Nicol above n. 10, 743.

section argues that the effect of the HRA 1998 is to involve the judiciary in a dialogue with Parliament about the content and effect of rights. It discusses the extent of the changes in the judicial role, as an indication of the possible definition of judicial merit. Section II argues that dialogic theory allows for a more attractive ideal of decision-making and a reflection of the new potential of the courts. It is also attractive because it allows for the judiciary to engage their consciences when considering a case, and to make those decisions with regard to a broad array of views.

Section III discusses a formulation of merit which is inclusive of the concept of diversity, and argues that academics, as an example, could act as a recruitment area for the judiciary, which involves accepting the idea that good advocates do not always make good judges.<sup>14</sup> Section IV discusses Loki, the 'trickster' of Norse mythology, to accommodate judiciary which appreciates the merit in diversity of thought. In doing so, this chapter hopes to promote a different criteria of judicial merit, one which relates to the knowledge of the candidate, as opposed to their experience of advocacy, and avoids the essentialism which a focus on diversity of form implicitly carries.

This chapter suggests that the myth of the Herculean judge is as much in need of reform as the image of the exclusively white and male judiciary, and examines the potential of Loki as a replacement for Hercules. The image of Loki is a more flexible one, incorporating different understandings and experiences, the narrative of Loki, unlike the myth of Hercules does not exclude alternative narratives, allowing for a range of alternative perspectives to scrutinise the law. Thus, rather than being an expression of the dominant sense of merit or morality,<sup>15</sup> Loki allows for the image of the judge to represent alternative solutions to moral dilemmas, or at the very least alternative methods of reasoning in reaching those solutions. Like Hale did in *R v Hasan*,<sup>16</sup> the Loki-esque judge understands the importance of creating intellectual space for otherwise unheard narratives.

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14 See H. Kennedy, *Eve was Framed-Women and British Justice* (Vintage, London 1993).

15 See J. Resnik and C. Heilbrun, 'Convergences, Law, Literature and Feminism' (1990) 99 Yale L.J. 1913; R. West, *Narrative Authority and Law* (University of Michigan Press, Ann Arbor, 1993); K. Abrams, 'Hearing the Call of Stories' (1991) 79 Cal. L. Rev. 971; R. Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative.' (1989) 87 Mich. L. Rev. 2411.

16 *R v (Hasan (Atyach))* (hereafter referred to as *Hasan*) [2005] UKHL 22, 2.A.C 467.

## **Section I**

### **Changes in the Judicial Role**

'The House of Lords is not a constitutional court, but the Human Rights Act has made it look like one.'<sup>17</sup>

The effect of the HRA 1998 has been to involve the judiciary within the United Kingdom in matters which, prior to its passage of the act, would not have come within its remit. By stepping further into the political arena they have opened themselves up to unprecedented criticism and scrutiny. In hearing cases which inevitably engage judges in questions of public policy the courts have opened themselves up to an entirely new form of trial – one which engages public opinion and provokes public debate. As a result, 'the judiciary as a whole is more exposed to public scrutiny than ever before ... Neither the Press nor politicians feel any constraint about embarking on severe criticism of the judiciary or individual judges.'<sup>18</sup> However, what such criticism of judicial actions reveals is a common question, which relates to the proper role of judges in society, rather than a debate over an allegedly complete and final reading of the HRA 1998. As Margit Cohn puts it; 'In essence, the question is normative; should the court actively engage with social and political issues?'<sup>19</sup>

As Malleeson describes it

the emergence of the judiciary as the third branch of government, checking and scrutinizing the executive, has narrowed the gap between the functions of the senior judiciary and elected politicians. Judges are not politicians in wigs but they are increasingly being required to reach decisions in politically controversial issues which cannot be resolved without reference to policy questions.<sup>20</sup>

The HRA 1998 has given unprecedented power to judges, widening the scope of judicial review and raising the spectre of a politically active judiciary. It allows for

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<sup>17</sup> B. Hale, 'The House of Lords and Women's Rights, or Am I really a Law Lord?' (2005) 25 L.S. 72, 72.

<sup>18</sup> D. Williams, 'Bias; the Judges and the separation of powers' [2000] P.L. 45, 55.

<sup>19</sup> M. Cohn, 'Judicial activism in the House of Lords; a composite constitutional approach.' [2007] P.L. 95, 95.

<sup>20</sup> K. Malleeson, 'Rethinking the Merit Principle in Judicial Selection.' (2006) 33 J.L. & Soc'y. 126.

two methods of judicial activism<sup>21</sup> – interpretation of a statute in order to make it compatible with the provisions of the HRA 1998, or a declaration of incompatibility if no such interpretation is possible.<sup>22</sup> As the role of the judiciary changes in relation to its scrutiny of the executive and legislature, the power of judges to decide the extent of rights, although limited by the text of the statute, is a change in what was previously a role in which judicial constraint, in the sense of avoiding policy questions, was possible. Put simply, every time an argument is raised before the courts on the basis of a human right the judge in question is asked to determine the nature and extent of this right.

The judicial role has thus expanded from determining what the law is in a dispute of rights, to include the ability to determine the extent of rights allowed by the law, and the best way of realising or giving effect to such rights. The HRA 1998 thus limits the judicial role by determining what form of rights are enforceable against public bodies, that is, civil and political rights,<sup>23</sup> and extends it by allowing the judge to determine the scope of the right. This function is seen, for example, in the use of the rights to privacy and freedom of speech, in which the courts determine the type of activity which will be afforded protection by the HRA 1998 and to what extent the rights are allowed. In other words, the judge is engaged in a delicate balancing act between the rights of the individual and society, asserting their moral power over the legislature through interpretation and declarations of incompatibility. Although this latter judicial power is used comparatively rarely, it serves to underline the power of the interpretive obligation.

The effect of a declaration of incompatibility is to make a judgment which has a moral and political consequence, describing the action of a public authority as contrary to universal and indivisible right. The judge is not, then, purely engaged in a process of law, but rather in a decision making process the outcome of which is moral and political.

This change in the judicial role has an impact on our expectations of the judge.

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21 The use of the word 'activism' here is deliberate and intended to communicate the potential under the Act for the judiciary to define their own role in constitutional arrangements.

22 HRA 1998 s.3.

23 G. Van Bueren, 'Including the excluded; the case for an economic social and cultural Human Rights Act.' [2002] P.L. 456



The ideal of the politically neutral judge has overtaken the idea that judges should be conservative. They are expected to act as a check on the political passions of the legislature as part of their constitutional role. As Baroness Hale observed, the House of Lords now has the ability to act as a constitutional court.<sup>24</sup> The differentiation between the functions of the higher and lower judiciary is one factor in constructing a definition of merit. The role of the judge differs depending on whether he or she performs an appellate function, as well as which Court he or she presides over. It is important to consider, when making a description of judicial merit, that the role of a Family Court judge is different to the role of a judge in a Chancery case, both of which differ from the role of the judge who sits on appeal, and so on.

The Supreme Court has the potential to adjudicate on issues which relate to numerous and disparate legal fields. In the last year they have been required to rule on matters as diverse as the treatment of Iraqi civilians and whether the Act could be relied upon to challenge the actions of public authorities outside the borders of the United Kingdom,<sup>25</sup> the right of a local authority to refuse planning permission against the protection of free speech afforded by Article 10,<sup>26</sup> whether a privately owned care home was acting in the capacity of a public authority,<sup>27</sup> rights of custody in the case of the abduction of a child,<sup>28</sup> and whether women at risk from female genital mutilation belonged to a clearly defined social group for the purposes of being granted refugee status.<sup>29</sup>

These decisions involved the House of Lords in political and often highly emotive decisions. All but one<sup>30</sup> directly involved the HRA 1998, and since 1998 the Appellate Committee of the House of Lords has adjudicated in countless cases where an individual has been in conflict with a public authority.<sup>31</sup> In these circumstances definitions of merit which prize objectivity and 'requirements designed to ensure that

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24 Hale above n. 17.

25 *Al-Skeini and others v Secretary of State for the Home Department* [2007] UKHL 26, (2007) 3 WLR 33.

26 *Belfast City Council v Miss Behavin' Limited* [2007] UKHL 19, (2007) 1 WLR 1420.

27 *L v Birmingham City Council* [2007] UKHL 27, (2007) 3 WLR 112.

28 *In Re D* [2007] UKHL 51, (2006) 3 WLR 989.

29 *Fornah v Secretary of State for the Home Department* [2006] UKHL 46, (2006) 3 WLR 733.

30 *Fornah v Secretary of State* above n. 29.

31 See House of Lords -Judicial Business <http://www.publications.parliament.uk/pa/ldjudgmt.html> accessed 1<sup>st</sup> Aug 2007.

only experienced practitioners are appointed to the bench.<sup>32</sup> become increasingly irrelevant. It is impossible to ask a judge to rule in matters such as those listed above without directly engaging their political and moral ideals.

The view of the judicial role which dominated the pre-HRA 1998 described the law as a 'bulwark between governors and governed, excluding arbitrary rule.'<sup>33</sup> Politics is 'an activity where the passions hold sway',<sup>34</sup> and the HRA 1998, brings law and politics into closer union, inevitably politicising the role of the judge. This politicisation acts to expose the element of ideology in judicial decision making which has so far, in Kennedy's view, acted as a family secret, affecting all generations as a truth that is known and denied.<sup>35</sup> The role of the judge (and thus the appropriate definition of judicial merit) in the constitutional dynamic after the HRA 1998 cannot be said to be the same. The 'novel and powerful tools for participation in social decision-making that affects defined rights' expands the judicial role into the political arena.

The public are entitled to look to an unrepresentative judiciary to countermand the actions of their elected representatives and other public bodies, or at least call their actions in to question. The judge, then, represents the interests of the individual against the state in many circumstances. It is no longer simply a matter of whether judges make law, but a question of what the law has made the judge into. In involving the judiciary in greater scrutiny of the actions of legislators,<sup>36</sup> the judge in hearing a case which involves human rights is, to a greater or lesser extent,<sup>37</sup> articulating an opinion about the appropriate balance to be struck between individual rights and reasonable demands of society. In such cases, the judge can be seen to be widening the judicial role to discuss the social and political context of the case in question. The judge involves him or herself in a debate about the content and extent of the right in question.

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32 Cohn above n. 19, 104.

33 Nicol n. 10, 722.

34 Nicol above n. 10, 722.

35 Kennedy above n. 4.

36 R. Clayton, 'The Human Rights Act Six Years On, Where are we now?' (2007) 1 E.H.R.L.R. 11 discussing the DCA's 'Review of the Implementation of the Human Rights Act'.

37 Dependent on their approach to the interpretation of the HRA 1998 and judicial deference, and their own ideological preferences. See Kennedy above n. 4.

In this way, a form of weak dialogic theory has emerged as an account of the judicial role under the HRA 1998. Rather than purporting to be a complete and uncontroversial account, however, dialogic theory is in part idealised, as, although it is possible to construe judicial decision making in the wake of the HRA 1998 as a dialogic process, it is not a view shared by all commentators or, indeed, the judiciary themselves. Yet the idea that judges and politicians are engaged in a dialogue about what is and what is not permitted under the HRA 1998 can be seen from the plethora of cases which, to a greater or lesser extent, engage the judiciary in an interpretative or declaratory relationship with legislation. That is to say, whether the judiciary accept that the actions of a public body have infringed the rights of the individual, whether they interpret legislation to make it compatible with the HRA 1998, or whether they make a non-binding declaration of incompatibility, all of these actions engage the judiciary in a scrutiny or consideration of the behaviour of a public body. The rulings and opinions which emerge from this scrutiny cannot, therefore, be apolitical, to the extent that they must consider, whether positively or negatively, the actions of the public body in question.

The HRA 1998 imposes several obligations on the judiciary.<sup>38</sup> These 'interlocking provisions....enjoin(s)' them,<sup>39</sup> when considering legislation and behaviour which interferes with rights under the HRA 1998, to take into account the jurisprudence of the European Court of Human Rights, to attempt to find an interpretation of the legislation which is compatible with the HRA 1998, and if this is impossible, to issue a declaration of incompatibility. In doing so, the courts themselves, acting as a public body, must adhere to the obligation in s6, namely to behave in a way that is compatible with the HRA 1998. Similarly it has been noted that the HRA 1998 and the definitions of rights which emerge from the courts are not intended to be static. On the contrary, such definitions of rights are intended to be symbiotic with society as a whole, developing and changing as society develops.

The new role of the judge thus demands not only endless time and knowledge, but an understanding which goes beyond the law and engages his or her conscience. It becomes more difficult, in such circumstances, to remain detached and aloof. It also

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38 Human Rights Act 1998 s2-s4, s6.

39 Bonner, Fenwick and Harris-Short, above n. 11.

seems important for the senior judiciary to re-evaluate their role in the light of such developments, and for both the judiciary and the public to consider the appropriate definition of judicial merit. Put another way, it seems impossible for a judge to rule on the proper assistance to be awarded a refugee, or a battered housewife, or whether a public authority can legitimately restrict the operation of a privately owned business in the name of public decency, without addressing their own understanding and moral sentiments, as well as considering the position of the individual. In cases such as these, empathy is a valuable attribute, creating space for the individual's experience and allowing the courts to comply with their s.6 obligation. Adjudicating a dispute in family law may seem to be a simple application of law to facts, but as Hale demonstrated in *Re G* it may also involve, or allow an opportunity to reconsider, disputable conceptions of what it means to be a parent.<sup>40</sup> The importance of deciding whether or not women in Sierra Leone were a social group for the purposes of the Refugee Convention was not a pure matter of law but involved the moral question of returning a woman to her native country to face a barbaric tradition such as female genital mutilation.<sup>41</sup> In these cases it seems unattractive to suggest that a judge should only concern themselves with matters of law, or should remain neutral and aloof between the parties, and the Herculean ideal can be seen to be inadequate. It seems contrary to the values expressed in the HRA 1998 to suggest that the judges should ignore humanitarian concerns and consider only the legal circumstances. To properly evaluate claims which involve social, moral and political concerns, the judge must accept the need for a social, moral and political understanding. Judicial decision making is no longer as simple as 'an erudite specialism in which canons of construction ...(are) applied rigidly to legislation.'<sup>42</sup>

This allows for a more empathetic approach to the judicial role. In short, it engages the judge in a decision making process which includes the experiences of the other, and obliges him or her to consider the events and circumstances in which the other operates. Like Hale did in *Hasan*, it asks that the language of the law be broadened in an attempt to recognise and accommodate the experiences of those who are outside the standard of the reasonable man. It is a method of adjudication which attempts to 'explode received knowledge of legal problems and structures, that reveals

40 *In re G (Children) (residence: same sex partner)* [2006] UKHL 43, (2006) 1 WLR 2305.

41 *Fornah v Secretary of State* above n. 29.

42 Nicol above n. 10.

moral problems...and provides a bridge to normatively better legal outcomes.<sup>43</sup>

Legal scholarship agrees that the role of the judge has changed in the wake of the HRA 1998.<sup>44</sup> The question then becomes a matter of what it has changed into. Even more importantly, if the perceived role of the House of Lords has changed from being the final court of appeal on questions of law to an authoritative voice in a constructive debate on issues of policy or the rights of the individual against the state, the role of the Law Lord differs from the role of a judge at first instance. It seems obvious that 'it is therefore inappropriate to attempt to construct one set of criteria by which the suitability of all levels of judges can be assessed.'<sup>45</sup> It is with this in mind that the discussion focuses on the role of the House of Lords/Supreme Court and dialogic theory in an attempt to further explore the concept of judicial merit in the wake of the HRA 1998.

Dialogic theory is the idea that the judge and the legislature are, since the passage of the HRA 1998, engaged in a constructive dialogue in which principles concerning political, social and moral issues are at stake.<sup>46</sup> In Nicol's view, it is a process through which the judge and the legislature are continually debating these ideals and their content. In the cases illustrated above, this seems a relatively uncontroversial conception of the judicial role, at least in its weaker form. The effect of the obligations in HRA 1998 is to allow for such an expansion of the judicial role, to allow the judiciary to engage, if not in a dialogue with Parliament and public authorities, at least in a criticism of their actions.

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43 L. N. Henderson, 'Legality and Empathy' (1987) 85 Mich. L. Rev. 1574, 1576.

44 K. Maleson, 'Modernising the Constitution, Completing the Unfinished Business.' (2004) 24 L.S. 119; K. Maleson, *The New Judiciary, the Effects of Expansion and Activism* (Aldershot, Ashgate Publishing 1999); B. Hale, 'A Supreme Court for the United Kingdom?' (2004) 24 LS 36; Bonner, Fenwick and Harris-Short above n. 11.

45 Maleson, 'The New Judiciary, the Effects of Expansion and Activism' above n. 44, 103.

46 See Nicol above n.10; A Hutchinson 'Judges and Politics, an essay from Canada.' (2004) 24 L.S. 275 discussing dialogue or dialogic theory in a Canadian context.

## **Section II**

### **Dialogic Theory and the Enhanced Judicial Role.**

Dialogic theory is a term which encompasses a wide array of perceptions of the judicial role in allowing questions of principle to be considered by others. Some forms of dialogic theory suggest that the judiciary should avoid resolving questions of principle and instead distinguish the case on procedural or other technical grounds, and allow Parliament to legislate the lacuna. Others suggest that the judiciary should embrace their newly politicised role and offer considered opinions on rights. It is the latter formulation of dialogic theory which is the focus of this chapter, and which will be addressed. It remains to be established, however, why the first formulation of dialogic theory is unsatisfactory, not simply in terms of the HRA 1998, but in describing judicial merit.

The idea that the judiciary, specifically the appellate courts, should not rule on questions of principle is problematic because of the 'denial' discussed in the first chapter.<sup>47</sup> The possibility that a judge will act in bad faith, by disguising issues of principle as matters of technical concern, such as procedural grounds, seems to recreate the problem of the Herculean image of the judge. The criticism of the Herculean image of the judge did not solely focus on the unrepresentative nature of the judiciary but on the inability of the judge to consistently uphold the Herculean ideal, and thus, whenever decisions were made on the grounds of political or ideological preferences, the judge was seen to be acting in bad faith. As argued previously, it was the failure of this myth which gave rise to the Nightmare image of the judge, which is, in itself, damaging to public confidence in the judiciary.

Similarly, it might weaken judicial resolve to clarify the meaning of the provisions of HRA 1998, especially in relation to the types of cases discussed above, in which the House of Lords interpreted the HRA 1998 to afford protection to those who could not avail themselves of it elsewhere. In the cases cited above it is difficult to establish where the legal framework ends and moral or other principles begin. The principled decision making required of the judge in cases involving the HRA meshes law and politics, and in order to achieve the full potential of human rights there must be

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<sup>47</sup> See Chapter 1 Section III and Kennedy above n 4.

the sort of fearless interpretation advocated by Baroness Hale.<sup>48</sup> In cases which involve, to a greater or lesser extent, questions of politics, ideology and moral considerations, it is useful to engage the social and moral conscience of the judge rather than asking them to discard such considerations in favour of mechanical application of legislation.

If the role of the judiciary is to, or rather already has, expanded into the socio-political sphere of a multicultural society then an ability to understand and address the concerns of the Other must be taken into consideration when evaluating judicial merit. Otherwise the preferences of the dominant section of society are likely to be imposed over those in a minority or who lack the agency to speak for themselves. As a result their narratives or experiences risk being drowned in the dominant discourse.<sup>49</sup> In an era of politicisation, is neutrality the most desirable – leaving aside the greater question of whether it is even possible- qualification for a judge?

Judicial empathy and a breadth of knowledge is, however, arguably more capable of advancing the cause of the Other. By forcing the actions of the empowered majority, in this case Parliament, to be counted against the suffering imposed upon those who are not so empowered, the Law Lords undoubtedly performed a moral as well as legal function. If the judiciary can adopt this role, the question to be asked is two-fold. To what extent should the judiciary involve themselves in social and political matters, becoming, as Malleon describes it, a check on the executive and legislature? Secondly, if this role is to be embraced, what description of judicial merit best suits the enhanced functions of the judiciary?

In his critique of Nicol's approach to the judicial role after the HRA 1998<sup>50</sup> Hickman argues that one of the difficulties of dialogic theory is that it does not describe what judges do when they are not adjudicating on matters which engage a human right.<sup>51</sup> When the judiciary act upon matters of law which do not raise issues relating to the human rights of the individual should they return to their Herculean

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48 Hale, 'A Supreme Court for the UK?' above n. 44, 8.

49 S. Berns, *To speak as a judge, Difference Voice and Power* (Ashgate, Aldershot UK 1999) 24

'Through the power of abstraction, the substitution of stock characters for real people, the replacement of ordinary stories by legal narratives, the law invents its own authority. It continually creates its own myths and enforces those myths upon the bodies of its subjects'.

50 Nicol above n. 10.

51 Hickman above n. 9.

function of mechanically applying laws to facts? This distinction involves a curtailing of judicial activism in domestic matters which do not touch upon human rights, and denies the tentacular effect of the legislation. It also suggests that, in the wake of the HRA 1998, the House of Lords does indeed become a constitutional court, or puts on a constitutional hat when discussing matters related to HRA 1998. Such an approach would elevate and distinguish human rights legislation as a separate, if not superior, legal framework.

It would also promote a desire amongst competing parties to establish that one particular case does or does not fall within the remit of the HRA 1998, thereby avoiding or encouraging judicial activism in certain instances. To limit principled decision making to the rights prescribed in the act is to encourage a schizophrenic approach to the judicial role, and to encourage more denial as both the individual and the judge struggles to justify locating a particular dispute within whichever legal framework fits their purposes best - avoiding or seeking the protection of the individual's human rights under the act. In short, such an approach to the changed role of the judiciary is not satisfactory.

Another potential method is that proposed by Nicol,<sup>52</sup> namely, to perceive the judiciary as an institution engaged in a dialogic process which is ongoing. Rather than have a ruling of House of Lords perceived as a settlement of the issue it would be worthwhile to perceive them as voicing an authoritative, but by no means immutable, opinion on the subject. This is an attractive idea because it promotes debate on moral issues whilst not denying that the judiciary are engaged in that debate. It is unattractive because it creates uncertainty and undermines the authority of the Lords, as well as the courts subordinate to it. It also suggests that the judiciary are performing a representative function, that, as they voice an opinion, is it an opinion representative of the judiciary as a whole or of some other constituent of the country? A pragmatic account of this potential implementation of dialogic theory makes it inherently unattractive, as it does not describe exactly where authority lies, leading to too great an amount of uncertainty.

This imperfection can be perceived as an indication of its inadequacy, but it can

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52 Nicol above n. 10.



also be perceived as a validation of the idea that there is no 'right' way to be a judge. Indeed, when viewed in context, as another competing account of what it is judges do and what they should do, it confirms that there is no satisfactory, universal account of the judicial role, least of all in an era of radical constitutional reform. If we embrace this ideal of dialogic theory, that the courts and the legislature are taking part in a political and moral dialogue, we may be obliged to sacrifice legislative certainty to a more complete and balanced account of the rights of the individual. If we accept that the courts should bow to legislative superiority and exhibit due deference, then a rigid application of law to facts will provide certainty at the expense of greater consideration individual rights and further reform of the role of the judge. It seems that a normative conception of the judicial role, and thus of judicial merit, involves the prioritisation of these considerations. In Lord Reid's famous dictum, do we want the law to be certain, or do we want the law to move with the times?<sup>53</sup>

The approach preferred in this thesis is something akin to Nicol's view of what it is judges should be doing. He describes his thesis thus:

Judicial output needs to be reconceptualised as a contestable entity, wherein courts present their thoughtful opinions on rights, which Parliament can substitute with its own favoured conception, providing it is willing to pay the political price. Elucidating the meaning of the Convention rights should therefore be seen as a shared responsibility between judiciary and legislature. A more candid acknowledgement of the judge's essentially political task under the (Human Rights Act) would help us overcome the cultural hurdle involved in seeing rights delineation as a contested and shared task<sup>54</sup>

This view of the function of the judiciary does take into account the need for certainty, and, much like our current constitutional arrangements, an opinion is only authoritative insofar as it has not been corrected by statute. It is not a perfect theory, as it does not adequately ascribe final authority to one institution or another, yet this flaw

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<sup>53</sup> Lord Reid, 'The Judge as Law-maker' (1972) 12 J.S.P.T.L. 22, 25.

<sup>54</sup> Nicol above n. 10.

can also be seen as a strength. The lack of final, transcendental authority suggests that rights are being contested, developed and considered over time. It allows for competing views of rights to be treated as valid without authority being vested in them because of their origin. It allows for the fallibility of judges and the legislature, and suggests that the 'stakes' on which the judge decides remain contestable. This relates to the Herculean image of the judge. If Hercules were to behave as an actor in a ideological debate, or rather, to acknowledge the ideological content of his judgments, he would lose the transcendence that gives his judgments their authority. The idea that the judge is behaving ideologically requires a cultural shift in our perceptions and ideals of judicial merit. Thus, the effect of the HRA 1998 in extending the judicial role into the arena of political decision making and debate requires a re-evaluation of the conception of the judicial role and definition of judicial merit.<sup>55</sup>

In doing so it counteracts the Herculean ideal of the judge as aloof and removed from the political fray, applying rigid canons of construction to facts. Although Hercules is a myth, it is not the Herculean ideal of the judge which is challenged in this thesis but rather the definition of merit which he represents. Where Hercules fails, Loki succeeds, because, rather than suggesting the ideal judge should deny his humanity or empathy, and counter his knowledge with a studied neutrality, the Loki-esque ideal suggests that the judiciary has a voice in an ideological debate, and, more importantly, accepts this as an element of the judicial role. Given the consensus that law and politics are losing their distinct territories, it seems that this is a timely admission. It is also important because it allows for the expansion of the judicial role into the political field. This is useful because in giving opinions the Law Lords are capable of considering several perspectives on a particular matter. In doing so, they are capable of giving content to concepts, and indeed do so through the attrition of the appellate structure. More importantly, in engaging the judiciary in a discourse of rights the inclusion of the Other becomes more than an ideological aim, but a distinct possibility.

In short, it is possible to make the judge representative of a diverse and multicultural society if it can be said that he or she understands, empathises with or is aware of the concerns of a variety of identities within that society. The purpose of a dialogic prescription of the judicial role is to ask the judiciary to be capable of

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<sup>55</sup> See Hale above n. 5.

representing those who are not in the courtroom, or represented in Parliament. The judiciary should be capable of understanding and giving voice to a range of identities and concerns, and of accommodating these concerns within the structure of the law. It would not be contrary to a duty to be impartial to ask that a judge be able to understand and articulate the views of other mindsets, in effect, to require the judge to speak for the Other as an element of judicial merit, which requires more empathy and understanding on the part of the judge.

The qualities of empathy, humanity, patience and courtesy do not carry with them the ideal of political neutrality. Rather, they suggest a sort of aggregated neutrality, an ability to see both sides of an argument, but also empathise with those on whose behalf the argument is made. A perception of the judiciary as out of touch does not suggest that the solution is to make them resemble society, but rather, understand it. This becomes more important at the upper echelons of the judiciary, and vital when appointments are being made to the House of Lords/Supreme Court as this will be (in dialogic theory) one of the most authoritative interpretations of the HRA 1998 within the United Kingdom.

So perhaps an alternative way of approaching judicial merit in an age of judicial politicisation is to demand that the judge be able to demonstrate understanding of a wide range of views on a wide range of matters. It might be included in the definition of merit that a judge have a broad range of understanding of political perspectives rather than of legislation. As many judges have commented, the judiciary are dependent on the arguments of counsel, but the aggregated arguments of counsel will usually provide the judge with a complete perspective of the legal arguments in the case. It then becomes important for judges to understand the potential policy implications of their decision, as well as its potential impact on precedent or the validity of the legal arguments in the case.



### **Section III**

#### **Judicial Merit**

The politicisation of the judicial role is a development which requires a re-examination of current images of the judge and judging. Judges have, with increasing regularity, been called upon to decide issues in the law, to rule, as Kennedy would have it, on an increasing number of stakes.<sup>56</sup> This involves the judiciary in decisions which involve moral, political and social considerations, making the judicial qualities of neutrality and objectivity increasingly difficult to sustain. The Herculean image of the judge cannot answer the challenges of the new judicial role, making a definition of merit which reflects or recreates Hercules inappropriate. Indeed, the government has recognised, if in passing, that the role of the Supreme Court will be sufficiently different to require a different Appointments Commission, perhaps even with a new definition of merit to reflect the fact that the Supreme Court will deal largely with 'refined points of principle.'<sup>57</sup> However, as Malleon points out, when measuring merit the definition of merit 'should be derived solely on the basis of the function to be fulfilled.'<sup>58</sup>

The enhanced judicial role seems to require a new definition of merit. The old criteria does not reflect the need for the judge, when interpreting the statute and adjudicating on disputes between citizens and the government, to include within the discourse the Other, and deliberately requires the judge to operate under restraint, ignoring, or claiming to ignore, their own ideological preferences.<sup>59</sup> As Baroness Hale did in *R v Hasan*,<sup>60</sup> it is important to imagine the effects of the law on those who do not conform to traditional legal concepts such as the 'reasonable man'. This is not to suggest that judges permit the law to become 'a charter for terrorists'<sup>61</sup> or invent rights where none exist, but simply that they have the capacity to empathise with experiences which traditionally remain outside the scope of judicial expertise.

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<sup>56</sup> Kennedy above n. 4.

<sup>57</sup> Hale above n. 44, 6.

<sup>58</sup> K. Malleon, 'Re-thinking the Merit Principle in Judicial Selection.' (2006) 33 J. of L. & Soc'y 126, 135.

<sup>59</sup> Kennedy above n. 4, 2 argues that judges behave strategically to achieve the image of not having an ideology 'they work for this effect against our knowledge of the ineradicable possibility of strategic behaviour'.

<sup>60</sup> *R v (Hasan (Atyach))* [2005] UKHL 22, 2.A.C 467.

<sup>61</sup> Lord Bingham, quoting Lord Glaisdale in *R v Howe* (1987) 2 WLR, (1987) 85 Cr. App. R 32. above n. 60 at para 22.

In this ideal, the judge is not aloof or removed from society, he is not avowedly neutral or deliberately conservative. The judge does not deny his humanity<sup>62</sup> but employs it, and seeks greater understanding rather than neutralising the law to a contest of rights. It is a definition of judicial merit in which expertise and ability to empathise with the parties in the case take precedence over an appearance of objectivity or denial of ideology. In this conception of what makes a good judge it becomes more important to have a balanced bench, but in terms of diversity of thought. Put another way, this image of the judge suggests that the judiciary be appointed with a view towards creating a desirable mix of minds, and a balance of professional and academic lawyers is suggested as the best way to achieve this, so that the 'eccentricities of judges (might) balance each other.'<sup>63</sup> This re-imagined judiciary, experientially rather than ethnically or biologically diverse, also has a wider pool of talent from which to draw, so the possibility of ethnic or biological diversity is enhanced, if it is deemed necessary to maintain public confidence or to promote equality by shattering the stereotype of the white male judge as representative of judicial power.<sup>64</sup>

These criteria, rather than intellectual capacity, decisiveness, authority and objectivity promote a different style of adjudication. This is a style of adjudication which Baroness Hale exemplified in *Hasan*,<sup>65</sup> her judgement was notable for its accessibility and clarity. Hale simplified and contextualised law through acknowledging the social reality in which it operates. Immunised to the criticisms which she has levelled at the other law lords, her knowledge of the 'facts of life' appeared encyclopaedic.<sup>66</sup> Sounding like 'the bright new hope'<sup>67</sup> on the bench, her judgement informal, clear, and lively, but most importantly, accessible she took the black letter of the law and rewrote it in shades of grey. In this way not only can the experience of the Other be included, it can also be understood. This is the image of the judge which Loki represents, a judge in whom empathy augments neutrality, and the

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62 See Hale above n. 5; Berns above n. 49; Henderson above n. 43.

63 B. Cardozo, 'The Nature of the Judicial Process' (Yale University Press 1961) 177, quoted in B. Hale, 'Making a difference, Why we need a more Diverse Judiciary' (2005) 56 N.I.L.Q. 281, 292.

64 See Kennedy above n. 4, 4.

65 above n. 60

66 See Hale, 'Equality and the Judiciary' above n. 5, 496 discussing her view that there are some 'wonderful' Family Court judges who have never 'cooked a fishfinger or changed a nappy in their lives'.

67 Kennedy above n. 14, 266.

ability to explain and edify replaces a need for authority.

Rather, it is to create a judiciary which finds the solution to a problem, an accommodation of competing rights, who includes the interests of the unknown Other in the decision making process. The purpose of the re-imagined judge is to be 'external to the system, but essential to its function, and thus it is a mediator between the inside and the outside, partaking of both, that he operates.'<sup>68</sup> The judge is then a mediator of conflicts of rights, not making judgments as a detached observer, but as an informed and aware participant. This does not mean that the judge should forego neutrality, but rather that he or she should attempt to attain that neutrality through a process of knowledge and understanding of the social and political context in which he or she operates

### A Question of Academics?

A decision in the House of Lords is final not because it is right but because none can say it is wrong - except writers in legal journals.....I have known *personally one or two* academic lawyers who would be welcome members of any appeal court. But I would not venture to prophecy when that will be done.<sup>69</sup>

This thesis advocates a mix of academic and professional lawyers on the judiciary to achieve diversity of thought. It allows for the end of the legal profession's monopoly of the judicial appointments process, and recognises the truth that it is not always a good advocate who will make a good judge.<sup>70</sup> This allows for academic scrutiny of the senior judiciary to be exposed not simply to public opinion but more importantly to the judges themselves. As academics are frequently the only source of in depth scrutiny of judicial decision making it is worthwhile to bring the two into close contact, to aid in the development of judicial reasoning by challenging it. By doing so, judges are permitted to allow the 'rights debate to take place openly between institutions rather than in the mind of the judge',<sup>71</sup> revealing their real reasons for

68 J.C. Frakes, 'Loki's function in the Tripartite System' (1987) 86 Journal of English and Germanic Philology 473.

69 Lord Reid above n. 53, 22-23 (emphasis added).

70 Kennedy above n. 14, 1-16 and 263-279.

71 Nicol above n. 10, 745.

decision making. Thus it will not be necessary to disguise ideology, or mask a political and moral conscience.<sup>72</sup> This is preferable to an unthinking conduit, mechanically applying legal rules, conventions and principles with the appearance of neutrality.<sup>73</sup>

The definition of judicial merit which reflects diversity of thought can be summarised in the image of Loki, the trickster god of Norse mythology. This image has been chosen as a better representation of the judge for two principal elements in the mythology surrounding Loki. The first is the fact that the identity of Loki is continually changing and changeable.<sup>74</sup> Loki frequently adopts disguises or changes his shape, species or gender depending on his purpose. This reflects the importance of empathy in the judge, the ability to understand the position of the other. The second reason is that Loki is the outsider in the Norse pantheon,<sup>75</sup> he is, like the judge in our current constitutional arrangements, engaged in a dialogue with the Asgard (that is, the ruling gods) but retains his independence from them.

Loki, then, with his ability to represent different biological identities and cross ideological boundaries is an image of the judge to whom neutrality is not gained through detachment but through understanding the concerns of both parties. In this image of the judge, the purpose of the adjudicative process is not to decide on the correct result of 'a math problem with humans',<sup>76</sup> but instead to consider the subjective experiences of individuals, and to engage, where appropriate, in a debate about the content and scope of human rights. With these qualities in mind, this section examines the image of Loki and the definition of merit he represents for an expanded judicial role.

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72 Kennedy above n. 4. Also see S. Lee *Judging Judges* (Faber and Faber, London 1998).

73 See E. Rackley, 'Representations of the (woman) judge, Hercules, the little mermaid and the vain and naked Emperor' (2002) 22 L.S. 602.

74 S. von Schnurbein, 'The Function of Loki in Snorri Sturluson's Edda' (2000) 40 (2) *History of Religions* 109.

75 von Schnurbein above n. 74.

76 C. Gilligan, *In a Different Voice-Psychological Theory and Women's Development* (2<sup>nd</sup> ed. Harvard University Press, Cambridge Mass. 1993) 25.

## Section IV

### Loki

It is not easy to draw any conclusions concerning the character of Loki from the highly contradictory tales told...a sort of benevolent scoundrel or trickster... (or) an absolute adversary of the Gods<sup>77</sup>

Loki, like Hercules, is a hero of sorts, however. he does not perform the same function as Hercules. Rather than being a superhero, Loki is more akin to a culture hero such as Prometheus.<sup>78</sup> In the Norse myths of the Asgard Loki is seen to be playing several roles. His function is often that of an ancillary or intermediary, but equally, it is Loki who leads to the downfall of the Asgard through Ragnarok.<sup>79</sup> So whilst Loki has the capacity to help the gods, he also has the ability to thwart their will and ultimately their rule. He is 'the outsider in the Northern Germanic pantheon.'<sup>80</sup> and in Snorri Sturleson's Edda,<sup>81</sup> Loki is even more complex. He frequently engages in various disguises, at one point taking on the form of a horse<sup>82</sup>, at another disguising himself as a woman,<sup>83</sup> and at still another the form of a salmon.<sup>84</sup> He frustrates all academic attempts to offer a complete definition of his character.<sup>85</sup> His many manifestations support the ideal of equality and diversity, as he does not adhere to one image. More importantly, however, is his capacity to change role, to become a hero, trickster, aide

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77 Above n. 74, 114-115.

78 'the core of the Loki figure is the culture hero' F. Cawley, 'The Figure of Loki in Germanic Mythology' (1939) 32 Harv. Theological Rev. 309, 309.

79 Also known as the doom or sometimes twilight of the gods, see the Seeress' prophecy circa 10<sup>th</sup> Century vv46-58 available in S. Sigfusson and S. Sturleson, 'The Elder Eddas of Saemund Sigfusson; and the Younger Eddas of Snorre Sturleson' available from [www.gutenberg.org](http://www.gutenberg.org) at <<http://www.gutenberg.org/files/14726/14726-8.txt>> last visited 23<sup>rd</sup> March 2008.

80 von Schnurbein above n. 74, 111.

81 'One of the most puzzling... (characters in the Edda is)... the god Loki, about whose essential nature there are almost as many opinions as there are scholars who have occupied themselves with him.' Cawley above n. 78 at 310. See also Y.S. Bonnetain, 'Potentialities of Loki'- *Old Norse Religion in Long-term Perspective*. Lund: University of Lund (at press, but meanwhile available online, last accessed 24<sup>th</sup> March 2008 [http://www.artantara.com/Potentialities\\_of\\_Loki.pdf](http://www.artantara.com/Potentialities_of_Loki.pdf)), and above n. 79.

82 To prevent the Gods losing their treasured possessions as related in the Edda.

83 To help Thor retrieve his stolen hammer Mjollnir, *The Lay of Thrym, or, the Hammer Recovered* Edda above n. 79 at 53 'Not only does Loki changes species, he also changes sex. Odin also changes species but he respects the sex boundary' Bonnetain above n. 81.

84 To escape the Gods after killing their favourite, Baldur, above n. 79, 315, 321.

85 See above n. 81.



and intermediary.<sup>86</sup> Loki is possessed of an 'impulsive intelligence,'<sup>87</sup> but he is not always the instigator of conflict. Loki is a different type of god, but he is as comfortable in the hierarchy as out of it.<sup>88</sup>

In this way Loki represents the enhanced judicial role under the HRA 1998. A judge has the capacity to interpret the HRA 1998 in such a way as to thwart the will of Parliament.<sup>89</sup> Similarly, Loki's impulsive intelligence and special knowledge reflects the desired capacity of the judge to see beyond the parties in the case to the broader policy implications and consider the position of the Other. Similarly, Loki's capacity to defy the gods reflects the 'fearless interpretation' Baroness Hale advocates.<sup>90</sup> Arguably the very difficulty in defining Loki contributes to his potential as an alternative judicial image. His refusal to commit to any one gender,<sup>91</sup> or even species<sup>92</sup> satisfies a degree of equality between social groupings or identities. In fact, the very ability of Loki to change his appearance and adapt his skills to suit the circumstances increases his potential to produce a 'reflective' judiciary.

Yet the adoption of the image of Loki is not purely designed to satisfy the appeal of fairness and equality. Rather, the image of Loki is intended to convey the potential of a mix of academic and professional lawyers in the Supreme Court. Loki, with his endless source of cunning, frequently acts in an advisory role to the more hot headed Gods.<sup>93</sup> He will take the opportunity, when it arises, to challenge their foolish behaviour and mock the less than honourable aspects of their character<sup>94</sup>. He has often been interpreted as a "culture hero" akin to Prometheus. Similarly, his presence

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86 See above n. 81.

87 von Schnurbein above n. 74 at 113 quoting G. Dumézil, perceiving Loki as an attempt to create an 'impulsive intelligence' in myth.

88 von Schnurbein above, describing Loki as a fiendish mischief maker and yet a benevolent scoundrel.

89 See -- *Lokasenna* in which Loki criticises the gods for their behaviour, available online at <http://www.sacred-texts.com/neu/poe/poe10.htm> last accessed 24<sup>th</sup> March 2008. Compare this with the judicial ability to thwart parliaments will under the Human Rights Act s3-whether through interpretation or through a declaration of incompatibility.

90 Hale, 'A Supreme Court for the UK?' above n. 44, 43.

91 See above n. 83.

92 von Schnurbein above n. 74.

93 von Schnurbein above n. 74.

94 *Lokasenna* above n. 89.

disrupts the pure social hierarchy of the Asgard,<sup>95</sup> as does that of his offspring.<sup>96</sup> His destabilising influence on the Aesir reflects the effect of the different judge. As a challenger to their homogeneous institution, he not only springs from the “wrong” background, but mates with the “wrong” people.<sup>97</sup> Like the woman judge, his ‘difference’ is a constant presence, and that difference is seen as the source of his potential disruption, both to the aesthetic and the realities of the Aesir’s existence. Although Loki’s propensity in myth is to bring chaos and disorder, there is no evidence that he is a wholly evil character, or a wholly good character.<sup>98</sup> The potential of Loki lies in his ability to confound and challenge the established order, without overruling it. The most striking feature of Loki’s identity is that, despite his status as a god, his ‘difference’ makes him seem human.

Just as Loki satisfies the human taste for narrative and mythic figures in the law, he is also truly independent. Loki has an agenda which is clearly separate from the Asgard. When it suits Loki to help the gods, he helps them, when it does not, he does not. Loki can be seen as an aide to the Asgard, even subordinate to them at times, but at other times he acts as an obstacle in their path. Loki’s behaviour betrays a relentless pursuit of an agenda which does not fly in the face of will of the Gods, nor is it dictated by them, but rather, Loki is self defined, and thus lacks the claim on transcendental reasoning and ultimate authority that Hercules would have.<sup>102</sup> He makes decisions without denying his fallibility, and admitting that there may be more than one side to the story. It also allows that judges have individual perceptions of the appropriate formula for judicial activity and adjudication. It allows for a racial and gender neutral bench without suggesting that the Judge him or her-self should adhere to any one method of judging.

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95 Loki’s mates are of varied and disreputable origin, as was he himself. Loki has been known to mate with giants, as well as engaging in trans-species sexual activity (giving birth to Sleipnir, the eight-legged steed of Odin see n. 96 below). In the complex genealogical hierarchy of the Asgard, Loki is blood-brother to Odin (the All-Father of the Gods) and yet remains ever the outsider.

96 Loki’s children are Hel, the goddess of the underworld, Fenris, the wolf, and the serpent who encircles the earth. He also has several other children (Sleipnir).

97 above n. 95.

98 von Schnurbein above n. 74.

102 See above Chapter 1 on the authority of Hercules as the detached, neutral man of reason.

## The merit of Loki

In the myth of Loki diversity is a value, an element of merit rather than a subordinate consideration. However, it is overly simplistic to suggest that difference based on reductive lines of gender, race and class in adjudication is sufficient. Loki represents the multiplicity of views and perspectives that are possible in any question of morality, in political or social issues, and experiences which fall outside his or her own. Loki represents the merit of empathy, of specialised knowledge, and independence.

The judge who understands and yet is not swayed by that understanding seems to be as fictional and aretaic a character as the judge who is devoid of feeling, ideology and understanding of the context in which he operates. To a certain extent this is true, yet, as was argued previously, it is not possible or desirable to de-mythologise the law entirely. Rather, the focus of this thesis has been on creating an image of the judge which is more appropriate to the changed judicial role under the HRA 1998, a reflection of the judicial role in the way that Dworkin conceived his understanding of the judge, that is, descriptive and prescriptive. This image of the judge tries to allow for and explain the expansion of the judicial role beyond 'due deference' and 'judicial restraint.'<sup>103</sup>

The image of Loki is deliberately indeterminate to allow for changes and developments in the judicial role. It is also deliberately metamorphic, so the image of the judge is, as Kennedy suggests, no longer a gendered understanding of virtue or power.<sup>104</sup> Rather, as Loki is the shape changing transgressor of boundaries, be those boundaries of gender, class, or species, the judge is not understood as a detached and aloof figure, but rather an intermediary. The image of the judge as Loki includes the idea of diversity as integral to, not separate from, the idea of merit. It accepts that judges can and do have different perceptions of their role, different ideologies, and

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<sup>103</sup> Cohn above n. 19, 1 'Critics... (of judicial activism)... remain, in varying degrees, true to traditional aversion towards judicial ascendancy, supported by models of "deference/due deference" which connote a tempered version of judicial participation and a rejection of the antonym "activism".'

<sup>104</sup> Kennedy above n. 4, 4.

different values, but they can also be of different backgrounds. In this way, diversity of form does not exclude diversity of thought, or vice versa. It also acknowledges the potential of diversity of thought, that is, that a judiciary composed of a mix of backgrounds, both academic and professional lawyers, might produce a diverse range of approaches to legal questions. Put another way, the image of Loki is inclusive of difference, but does not seek to eradicate it.

### **Conclusion**

This chapter has argued that the changes in the judicial role under the HRA 1998 has made the need for a re-imagined judge more urgent. It has argued that focusing on diversity of form to the exclusion of diversity of thought is a potential pitfall in broadening the pool of talent from which judges are appointed. It has also tried to emphasise that the two are not mutually exclusive. This chapter has argued that the benefit of having a greater range of experience on the bench would allow the Supreme Court to play a more meaningful role in a constitutional dialogue. By broadening the search for diversity outside the traditional routes to the Bench, more solicitors, academics and other legal experts would be available to create a wider pool of talent from which to draw a more diverse judiciary in terms of diversity of form, whilst adhering to the Loki ideal, a Bench rich in experience and knowledge, possessed of an intelligence and experience which is more than the sum of its parts. A focus on diversity of thought as well as diversity of form would allow for a judiciary composed of individuals with different experiences, understandings and ways of thinking about the law, in order to meet the challenges of an increasingly politicised judicial role, and to explain what it is judges do to an increasingly curious public. In short it would be possible that the Supreme Court could have

a different, more explicitly constitutional role and in time a rather different sort of membership, might there come a time when the ...the Court became accessible and accountable to the public in a way that we cannot imagine now?<sup>102</sup>

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<sup>102</sup> Hale above n. 44, 44.

## **Conclusion**

Do we really want an image of judging in which people are processed like data, decisions made, power exercised...without any sense of human agency. Is that not truly terrifying, an ultimate image of power without authority?<sup>1</sup>

This thesis examined the concept of the Herculean judge as a barrier to judicial diversity. Taking the view that the image of the Herculean judge was a myth of judicial neutrality, the thesis discussed the effect it has had on attempts to achieve judicial diversity.

Chapter One discussed the Herculean image of the judge, investigating popular images of the judiciary to understand what public expectations of the judge are. It explored the meaning behind the symbolic representations of the judge, and their consequences for the relationship between the judge and the judged. It consequently argued that attempts to achieve judicial diversity have been skewed by the myth of the superhero judge, and been structured along essentialist lines to avoid confronting this image of the judge, or need to believe in "neutral" adjudication.

The Herculean image of the judge, it was argued, suffers from the 'denial' that Duncan Kennedy has identified,<sup>2</sup> but it is not the reality of adjudication that is the problem. The myth of the superhero judge constructs the definition of judicial merit as transcendental detachment from the parties. This becomes an expectation that the judge is ignorant of the real world, an image that the judiciary speak from an isolated ivory tower, or as Dworkin describes it, from Mount Olympus.<sup>3</sup> The judge is then constructed as aloof and separate from those on whom he must adjudicate. This denies the fact that it is desirable that the judge is aware of the social context in which they operate, and capable of responding to it.

This image of the judge as a superhero, and its permutations, continues to act as

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1 S. Berns, *To Speak as a Judge, Difference Voice and Power*. (Aldershot Ashgate, UK 1999) 14.

2 D. Kennedy, *A critique of adjudication; fin de siecle*. (Harvard University Press, Cambridge, Mass. 1997).

3 R. Dworkin, *Law's Empire* (Hart Publishing, Oxford 1998).

a barrier to judicial diversity. In understanding the judge as a superhero, our understanding of judicial merit is structured along these mythic lines. So the judge must be seen as transcendent in order to achieve authority. This conception of judicial merit describes it as attainable only through neutrality. Neutrality is then conceived of as consisting of judicial separation from the social context, in ignorance of the everyday concerns upon which decisions will impact. Thus the legal process appears to be a depersonalised application of rules to facts, rather than a process of decision-making which is reflective of the society in question.

The question of neutrality provokes a more complex inquiry. Why has neutrality been given the content it has been given? More simply what does the myth of the Herculean image of the judge tell us about the needs of those who tell the story of neutral and detached adjudication? It implies, as argued in chapter one, an association of legitimate power with the image of the educated, aged white male. The Herculean image of the judge betrays this need. The possibility that the reform of the judicial appointments system will create a judiciary of Hercules with different faces allows the public's confidence to remain with the same understanding of how justice will best be achieved. It allows the process of denial to continue, with judges pretending that they are neutral, whilst making decisions, even when operating with 'good faith', based upon an internalised set of norms. Similarly, retaining the requirement of advocacy experience and experience in sitting as a judge is an example of the infatuation with an ideal, the image of the superhero judge may not be capable of maintaining public confidence, but it seems that those who seek to reform the judicial appointments process believe that Hercules simply needs a new face.

It has been contended throughout this thesis that the myth of the Herculean judge is out of date. It does not adequately explain the process of adjudication and continues the idea that there is one 'right' way to be a judge. More seriously, in appearing to embrace diversity it threatens to eradicate difference by codifying an ideal of judicial merit. As discussed in Chapter Two, this image of judicial merit relates to the ideal of the Herculean or superhero judge of endless skill, talent, ability and time. However, it was argued that this image of the judge is connected with an understanding of the judge as an inherently masculine figure, embodying the values of detached reasoning and dispassionate decision making which were seen to be the sole preserve of

men.<sup>4</sup> Thus, this thesis examined the exclusion of women from the legal profession, and the judiciary. This was to reflect the perception of the lawyer as a male figure, and that only good advocates make good judges. The exclusion of women from the legal profession, and the privileged access of accomplished barristers to the judiciary, resulted in a double barrier for women, who were neither able to practice the law, until the early part of the 20<sup>th</sup> century, nor to adjudicate upon it.<sup>5</sup> This thesis also noted the need for those women who did enter the legal profession to behave as exceptional women or extraordinary men.<sup>6</sup> Thus, women who did attain judicial rank found that they were denied their femaleness, and expected to detach themselves from their femininity as the male judge was expected to transcend his own identity.

If the 'judge who inhabits our legal imagination is expected to transcend, deny and eclipse his 'self' by submitting to something 'bigger' and 'higher'... his judgments may properly be regarded as 'impartial' and 'objective' in the sense that different judges, all with similar values and attributes, will reach identical decisions.'<sup>7</sup> The challenge of the woman judge, who disrupted the aesthetic of the bench, marked out as different and thus inviting criticism for a perceived lack of detachment.<sup>8</sup> Women were viewed as dangerous, destabilising influences, a threat to the neutrality of the bench, and inherently incapable of achieving the judicial ideal.<sup>9</sup> Arguably, this provoked the question of merit when judicial diversity was discussed.<sup>10</sup> As argued above, however, in the new judicial role, as influenced by the effect of the HRA 1998, the judge must be connected to those on whom he adjudicates. He must be aware, and be seen to be aware, of the social ramifications which result from his decisions. There must be an awareness on the part of the judge – put another way, Justitia must be peeking.<sup>11</sup>

4 'I would like, obviously, the judiciary to be as diverse as we can get it. But that must not interfere with the fundamental principle that we have got to choose the best man for the job' Lord Lloyd of Berwick, evidence to the Constitutional Affairs Committee, First Report *Inquiry into the Provisions of the Constitutional Reform Bill*, 2003-4, HC 48-II, as quoted in K. Malleon, 'Re-thinking the Merit Principle in Judicial Selection.' (2006) 33 J. of L. & Soc'y 126, 126.

5 B. Hale, 'The House of Lords and Women's Rights or Am I really a Law Lord?' 25 L.S. 72.

6 See above Chapter 2 generally and C. Wells 'Exceptional Women or Honorary Men? Notes from the Women Law Professors' Project' (2000) 53 C.L.P. 181.

7 E. Rackley, 'Representations of the (woman) judge, Hercules, the little mermaid and the vain and naked Emperor' (2002) 22 L.S. 602.

8 E. Rackley, 'Judicial diversity, the woman judge and fairytale endings.' (2007) 27 L.S. 74.

9 That is, endowed with the feminine qualities of empathy, connection and care women were perceived as inherently incapable of matching the stereotype of virtuous male power described by Kennedy, and thus incapable of matching judicial virtues.

10 As discussed in B. Hale, 'Equality and the Judiciary: Why should we want more women judges?' [2001] P.L. 489, 497.

11 J. Resnik and C. Heilbrun, 'Convergences, Law, Literature and Feminism' (1990) 99 Yale L.J. 1913.

Chapter two examined the history of female exclusion<sup>12</sup> from and the terms of women's participation from the legal system and the judiciary. It argued that the marginalisation of women in law on the basis of difference and the 'essentialist trap' of arguments for greater female participation in the legal system based on difference, and the reforms to the judicial appointments system in the CRA 2005. It discussed the "new" definition of judicial merit and used comparative analysis to suggest the Herculean image of the judge was still operative on attempts to diversify the judiciary. Using Carol Gilligan's research *In a Different Voice*<sup>13</sup> as an example, it considered the arguments for judicial diversity, and discusses difference in adjudication.

The potential of difference provided the opportunity to re-imagine the judge, and consider new ways of adjudication. Through an examination of the concept of difference in Chapter Two, it was argued that Gilligan's positive articulation of different approaches to moral reasoning created the possibility of a new approach to legal reasoning. The new image of the judge must be disassociated from the perceived impossibility of fallibility. Put another way, the judge must be prepared to admit he or she could be wrong, that they may make the wrong decisions, they they are not 'philosopher kings bent on divining the meaning of the law'<sup>14</sup> with 'superhuman talents and endless time.'<sup>14</sup> Nor are they purely political or ideological actors, however, in their new role as interpreters of the HRA 1998, the Law Lords can be seen to behave in a political fashion, making decisions which engage their social and moral beliefs. The effect of the HRA 1998 has been to allow the judge to involve themselves in matters which were traditionally conceived to be the preserve of parliament without engaging in the game of denial, or burying political decisions beneath arguments of precedent.

The problem is then the type of definition of judicial merit, and the judiciary it creates, that the reforms are aimed at achieving. This thesis argued that addressing only the image of the judge allows the underlying concept of merit, and our expectations of

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12 As before, the exclusion of the female judge is taken to be the specific example of the Other. This thesis does not seek to promote the experiences of one identity at the expense of another but rather view exclusion as an injustice which can be perpetrated against any individual.

13 C. Gilligan, *In a Different Voice-Psychological Theory and Women's Development*. (2<sup>nd</sup> ed. Harvard University Press, Cambridge, Mass. 1993).

14 -- 'The Supreme Court -Their Majesties' *The Economist* 31<sup>st</sup> May 2007

[http://www.economist.com/books/displaystory.cfm?story\\_id=9253895](http://www.economist.com/books/displaystory.cfm?story_id=9253895) last accessed 25<sup>th</sup> July 2008.

14 R. Dworkin above n. 3, 245.



the judge, to continue. It suggested that a preferable method of attaining judicial diversity is through an appointments system which requires a diversity of thought. This means that judicial appointments should be made with the aim of ensuring an appropriate blend of skills and experience on the bench. Taking the reforms to the judicial appointments system which were enacted in the CRA 2005, and subjecting them to a critical examination, this thesis argued that the criteria of merit in judicial appointments reflects a continued infatuation with the superhero judge, and whilst encouraging diversity of form, does not encourage diversity of thought. This image of the judge is still operative on attempts to gain judicial diversity, which has resulted of a preference for diversity of form, as opposed to diversity of thought.

Chapter Three examined the jurisprudence of the most 'different' law lord, Baroness Brenda Hale, the first female appointee to the House of Lords. This chapter employed Gilligan's articulation of difference from *In a Different Voice*<sup>15</sup> to analyse Hale's method of reasoning and compared it with the reasoning of Lord Bingham, and then examined her jurisprudence using the tools of literary criticism. Using these two methods of analysis it explored Hale's decision-making process to assess the potential impact of greater judicial diversity. Suggesting that Hale's approach to legal issues and legal reasoning diverges from that of the other law lords, her argument was analysed as a narrative to examine the use of symbols and characterisation as strategies deployed to achieve inclusive adjudication. That is, it is an approach which attempts to include and accommodate the experiences of 'the other'.

In short, whilst the attempt to attain judicial diversity is welcome, the reforms fall far short of attaining judicial diversity of thought without reference to age, gender, sexual orientation or race. Rather, they confirm the ideal of the superhero judge, and simply admit the possibility that the 'different' judge can also conform to this ideal. This thesis argued that it is the ideal, or myth, of the judge that needs to be challenged, in addition to the homogeneity of the bench. If the traditional image of the judge, the Dworkinian ruler of Law's Empire,<sup>16</sup> is inaccurate and unhelpful,<sup>17</sup> by perpetuating and legitimising this image of the judge through the appointments criteria a valuable opportunity has been missed. In foregoing the chance to re-imagine desirable judicial

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15 Gilligan above n. 13.

16 Above n. 14.

17 A. Hutchinson, 'Indiana Dworkin and Law's Empire' (1987) 96 Yale L.J.637.

qualities, the Commission has missed an opportunity to recreate the judicial myth, and devalued the potential of diverse approaches to the law and adjudication. Put another way, by continuing the ideal of the superhero judge, the Commission perpetuates the fiction that there is one right way to go about adjudication. This thesis suggested the image of Loki as an alternative way of imagining the judge, as the embodiment of a court made up of a mix of academic and professional lawyers, with the intention of creating a Supreme Court with a balance of expertise.

In making this argument this thesis concentrated on the Supreme Court, the reformed House of Lords' Appellate Committee.<sup>18</sup> This was a result of practical limitations. A further reason was that the principle focus of this thesis was on the jurisprudence of Baroness Hale, as the first appointee to the House of Lords who represented both diversity of form and diversity of thought, re-enforcing the fact that the two are not mutually exclusive. This thesis contended that the difference Baroness Hale's appointment and work in the Lords has made is due to her 'diversity of thought' (that is, a different professional background) as opposed to her 'diversity of form' (that is, her gender.)

Chapter Four discussed the changes in the judicial role which have been instigated by the expansion of judicial review and the increased politicisation of the judiciary due to the HRA 1998. It also argued that media scrutiny of the judiciary will only continue to increase as the Supreme Court involves itself in more human rights related issues, and is seen to make unpopular decisions. As the judges of the Supreme Court progressively expand their role into the arena of politics, the need for a more diverse judiciary becomes secondary to the need for a judiciary who are capable of explaining to and identifying with the public. Arguing that the judicial role has been politicised, it has been suggested that the new judicial role requires a re-evaluation of judicial merit. As judges are seen to be actively engaging with political issues, they must also actively engage with the public, therefore, detachment and transcendence become less important to create judicial neutrality. This chapter considered the definition of judicial merit and argues that it is possible, and desirable, to re-imagine the judicial image to allow a more diverse judiciary which views both diversity of form and diversity of thought as elements of judicial merit.

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<sup>18</sup> Constitutional Reform Act 2005 Part 3 s 23-60.

This thesis made the further argument that an infatuation with the Herculean judge is responsible for focusing attempts to achieve judicial diversity on diversity of form rather than diversity of thought. It suggested that the Herculean image of the judge and its grip on the imagination of both the public and the legislature, its concentration of power in the hands of the white male judge, has created an understanding of diversity as purely along lines of social identity.

Whilst diversity of form is desirable in the interests of social equality and education,<sup>19</sup> diversity of thought is a more challenging but worthwhile goal. It requires both the public and the academy to confront the superhero image of the judge, and re-evaluate what we perceive as desirable judicial qualities.<sup>20</sup> The reformed criteria and the commitment to promote judicial diversity do not ensure that different approaches to the law and adjudication will be taken, but rather seem designed to prove that anyone can be a superhero judge, regardless of race, gender, or social background. In continuing this myth of the judge, the reforms act to ensure a homogeneous set of values. This cements the tenacious grip on the public consciousness that the myth has. It ignores the possibility that, by allowing differently trained individuals, with a different mindset and approach to legal issues onto the bench, it might be possible to reconsider what role judges can and should play in society. It also denies the blurring of the boundary between law and politics which has emerged in the latter half of the 20th Century.<sup>21</sup>

As Hale has argued 'the case for members of a first tier, error correcting appeal court having experience as a trial judge is much stronger than the case for members of a second tier, points of important principle resolving, Supreme Court.'<sup>22</sup> The decision making processes of the Supreme Court will increasingly involve a dialogic element,<sup>25</sup> as was argued in the previous chapter. The changes in the judicial role require a new conception of judicial merit. The judge must be aware of the context in which his or her decisions have been made, but they must also be able to explain these decisions in a manner which is intelligible to laymen. It is no longer sufficient to have a judiciary

19 S. Sherry, 'The Gender of Judges' (1986) 4 Law & Ineq. J. 159, 160.

20 See Chapter 2 Section I.

21 See Chapter 4.

22 B. Hale, 'A Supreme Court for the United Kingdom?' (2004) 24 L.S. 36, 41.

25 See Chapter 4 Section II.

composed of highly trained lawyers. The new Supreme Court must be able to tell the story of the judgment, that is, to explain the reasons behind the decision in a clear and accessible fashion.

This difference formed the basis of an argument for a blend of professional and academic lawyers on the Supreme Court in 2008, both in order to improve the work of this Court and to challenge the Herculean image of the judge, as well as destabilising the 'Nightmare' image of the judge which, this thesis argued emerges when judges are seen to fail to live up to the Herculean ideal. This thesis suggested that a reformed understanding of the judge, and the judicial role, could potentially be represented by a new legal myth - here imagined as Loki.<sup>26</sup> It was argued that the trickster god of Norse mythology was a better image of the judge, representing a multitude of identities and incorporating the experiences of the Other in judicial decision making, allowing a more complete approach to adjudication and representing the constructive dialogue that is the aim of dialogic theory.

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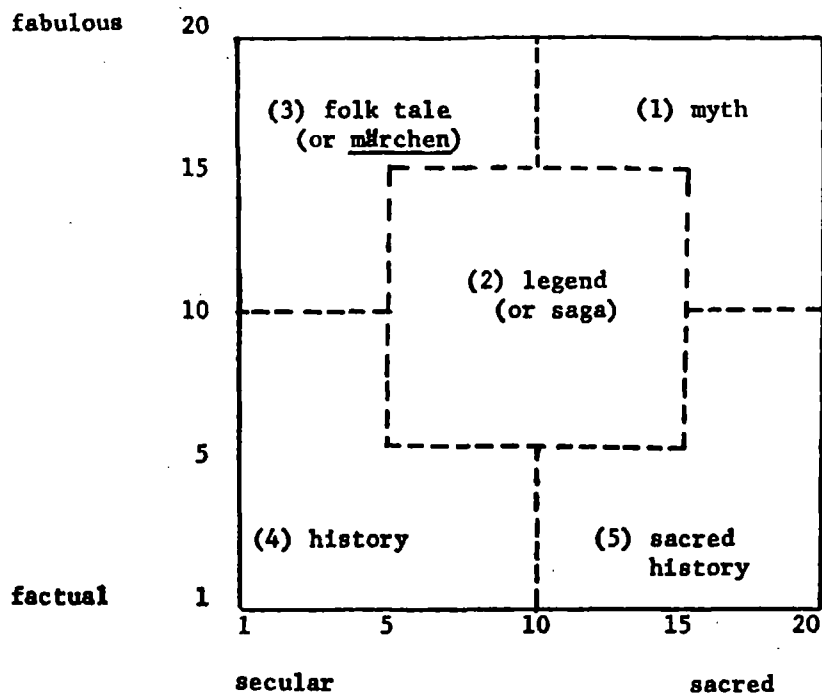
<sup>26</sup> S. von Schnurbein, 'The Function of Loki in Snorri Sturluson's Edda' (2000) 40 (2) *History of Religions* 109.

**Appendix 1**

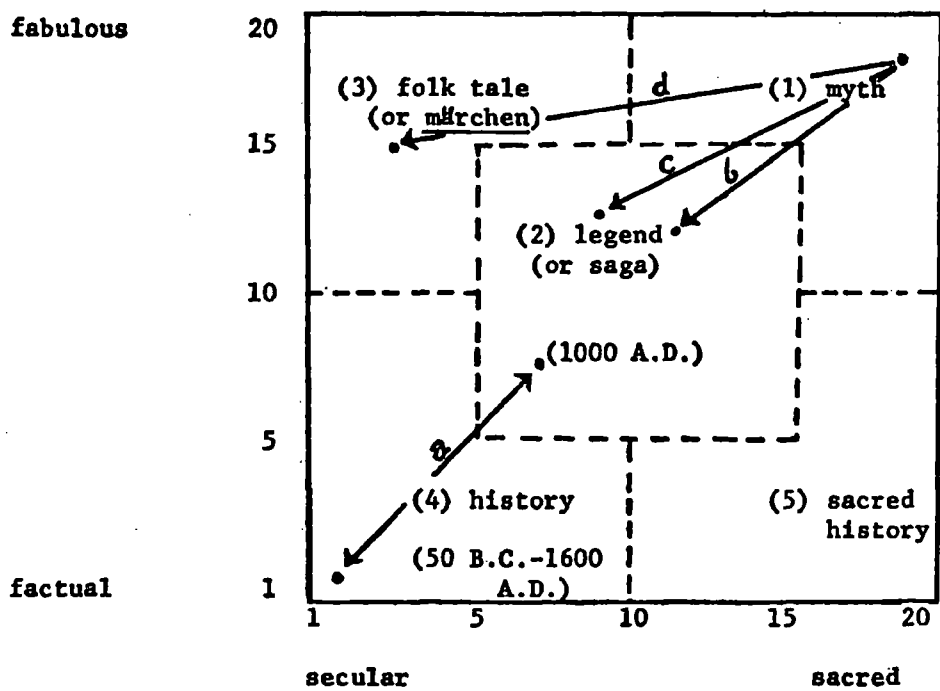
**A Two Dimensional Scheme for the Classification of Narratives.**

**C. Scott Littleton**

**(1965) 78 The Journal of American Folklore, 21, 27.**



GRAPH I



GRAPH II

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